No. 90-675

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

CINEMA BLUE OF CHARLOTTE, INC., a North Carolina Corporation, aka CINEMA BLUE ADULT ENTERTAINMENT CENTER, aka CINEMA BLUE OF CHARLOTTE, aka CINEMA BLUE, JIM ST. JOHN AND CURTIS RENE PETERSON,

Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

KLEIN & SHAFER, P.C.
BRADLEY J. SHAFER*
LEE J. KLEIN
4121 Okemos Road, Suite 20
Okemos, MI 48864
(517) 349-8666
Attorneys for Petitioners
*Counsel of Record

NELSON M. CASSTEVENS, JR.
P.O. Box 34607
Charlotte, NC 28234

CALVIN MURPHY
Suite 210, 1 N. McDowell
101 N. McDowell Street
Charlotte, NC 28204

EBEN RAWLS
730 Trade Street
423 Law Building
Charlotte, NC 28202
Co-Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. MAY A COURT IN A CRIMINAL OBSCENITY PROSECUTION, CONSISTENT WITH A DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS AND WITH THIS COURT'S PRONOUNCEMENTS IN *KAPLAN V. CALIFORNIA*, 413 U.S. 115, 121 (1973) AND *HAMLING V. UNITED STATES*, 418 U.S. 87 (1974), TOTALLY EXCLUDE FROM EVIDENCE ALL DEFENSE-PROFFERED TESTIMONY REGARDING "CONTEMPORARY COMMUNITY STANDARDS", INCLUDING PUBLIC OPINION STUDIES OF THE RELEVANT COMMUNITY UTILIZING THE ACTUAL MATERIALS ALLEGED TO BE OBSCENE?

II. DO CONVICTIONS FOR CONSPIRACY TO DISSEMINATE OBSCENITY AND FOR BEING AN ACCESSORY BEFORE THE FACT TO THE DISSEMINATION OF OBSCENITY VIOLATE THE FIRST AMENDMENT AND THE HOLDINGS OF *SMITH V. CALIFORNIA*, 361 U.S. 147 (1959) AND *HAMLING V. UNITED STATES*, 418 U.S. 87 (1974) WHERE THERE IS NO EVIDENCE PRESENTED THAT THE DEFENDANTS HAD KNOWLEDGE OF THE SPECIFIC CONTENTS OF THE MATERIALS ALLEGED TO BE OBSCENE, OR EVEN THE EXISTENCE OF ANY PARTICULAR MATERIAL?

III. DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE THAT THE JURY BE INSTRUCTED AS TO EACH ESSENTIAL ELEMENT OF THE ALLEGED CRIME OF DISSEMINATING OBSCENITY, INCLUDING A STATUTORILY MANDATORY PROVISION THAT THE OBSCENITY OF "DEVIANT" MATERIALS SHALL BE JUDGED WITH REFERENCE TO INDIVIDUALS IN THAT SPECIFIC GROUP?

QUESTIONS PRESENTED – Continued

IV. IS THE GOVERNMENT REQUIRED, IN AN OBSCENITY PROSECUTION OF "DEVIANT" MATERIAL, TO PUT ON AFFIRMATIVE EVIDENCE AND/OR TESTIMONY REGARDING THE OBSCENITY OF SUCH "DEVIANT" MATERIAL, AN ISSUE THAT THIS COURT SPECIFICALLY RESERVED IN *PARIS ADULT THEATRE I V. SLATON*, 413 U.S. 49 (1973)?

V. DOES THE PRESENT OBSCENITY STANDARD AS SET FORTH IN *MILLER V. CALIFORNIA*, 413 U.S. 15 (1973) FAIL TO COMPORT WITH THE FIRST AMENDMENT IN BEING VAGUE, AMBIGUOUS AND OVERBROAD?

DISCLOSURE OF THE CORPORATE AFFILIATIONS PURSUANT TO RULE 29

Cinema Blue of Charlotte, Inc., has no parent companies or subsidiaries to list pursuant to Sup. Ct. R. 29.1.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

DISCLOSURE OF THE CORPORATE AFFILIATIONS PURSUANT TO RULE 29 iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

I. THE ISSUE OF WHAT EVIDENCE MAY BE RELEVANT TO AND ADMISSIBLE OF CONTEMPORARY COMMUNITY STANDARDS IN AN OBSCENITY PROSECUTION IS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, AND IS AN ISSUE THAT HAS RESULTED IN CONFLICTING AND OPPOSING APPELLATE DECISIONS ACROSS THE COUNTRY 10

A. The North Carolina Court of Appeals decision affirming exclusion of the totality of expert witness evidence and testimony results in a deprivation of the fundamental right to put on a defense under the Sixth and Fourteenth Amendments, and conflicts with numerous decisions of this Court.... 10

B. Exclusion of proffered "comparison" evidence and testimony relating thereto illustrates the need for direction from this Court regarding evidence and testimony that is relevant to, and therefore admissible of contemporary community standards..... 19

TABLE OF CONTENTS – Continued

Page

II. THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS, SUSTAINING A CONVICTION WITHOUT ANY KNOWLEDGE ON THE PART OF PETITIONERS ST. JOHN AND PETERSON OF THE CONTENT OR EVEN THE EXISTENCE OF THE SPECIFIC MATERIALS ALLEGED TO BE OBSCENE, IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT 21

III. THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS, IN AFFIRMING THE TRIAL COURT'S DECISION TO NOT INSTRUCT THE JURY AS TO EACH ESSENTIAL ELEMENT OF THE ALLEGED CRIME, IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND DEPRIVED PETITIONERS OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT 24

IV. WHETHER THE PROSECUTION IS REQUIRED TO PUT ON EXPERT OR OTHER TESTIMONY AND EVIDENCE AS TO THE OBSCENITY OF "DEVIANT" MATERIAL IS AN ISSUE THIS COURT SPECIFICALLY RESERVED IN *PARIS ADULT THEATRE I V. SLATON*, 413 U.S. 49 (1973), WHICH SHOULD NOW BE ADDRESSED BY THIS COURT 26

V. SINCE THE DECISION BY THIS COURT IN *MILLER V. CALIFORNIA*, 413 U.S. 15 (1973), HISTORY HAS WELL ILLUSTRATED THAT THE PRESENT TEST FOR OBSCENITY IS VAGUE AND FAILS TO GIVE ANY CLEAR NOTICE AS TO WHAT MATERIALS MAY BE ILLEGAL AND THUS CRIMINALLY PROSCRIBABLE, AND WARRANTS REEXAMINATION OF THIS LEGAL STANDARD 27

CONCLUSION 29

TABLE OF CONTENTS – Continued

Page

APPENDICES:

APPENDIX A – DECISION OF THE NORTH CAROLINA COURT OF APPEALS DATED JUNE 5, 1990..... App. 1

APPENDIX B – ORDER OF THE NORTH CAROLINA SUPREME COURT DATED JULY 31, 1990..... App. 9

APPENDIX C – RELEVANT U.S. CONSTITUTIONAL PROVISIONS, UNITED STATES CODE AND NORTH CAROLINA STATUTES..... App. 12

APPENDIX D – FINAL REPORT OF THE MECKLENBERG COUNTY, NORTH CAROLINA FILM EVALUATION PROJECT DATED FEBRUARY 19, 1989..... App. 17

APPENDIX E – EVIDENTIARY RULING BY THE HONORABLE JUDGE MARVIN GRAY..... App. 87

APPENDIX F – *ASAFF V. TEXAS*, M.A. 87-48932-L (Tx. App. September 28, 1990)..... App. 88

APPENDIX G – *STATE EX REL PIZZA V. STROPE*, 54 Ohio St. 3d 41 (1990)..... App. 99

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State, 144 Ga. App. 233, 240 S.E.2d 754 (1977), cert. denied, 439 U.S. 899 (1978) 23

Armstrong v. Manzo, 380 U.S. 545 (1962) 11

Asaff v. Texas, MA 87-48932-L (Texas App. September 28, 1990) 13, 17, 18

Avalon Cinmea Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981) 23

California v. Green, 399 U.S. 149 (1975) 10

California v. Trombetta, 467 U.S. 479 (1984) 11

Carlock v. State, 609 S.W.2d 787 (Tex. Cr. App. 1980) 13, 16

Chambers v. Mississippi, 410 U.S. 284 (1973) 10, 11

Cinema Blue of Charlotte, Inc. v. Gilchirst, 704 F.Supp. 631 (W.D.N.C. 1989) 4, 26

Cinema Blue of Charlotte, Inc. v. Gilchrist, 887 F.2d 49 (4th Cir. 1988), cert. denied, 110 S.Ct. 1479 (1990) 5, 8, 14

City of Miami v. Florida Literary Distributing Corporation, 486 So.2d 569 (Fla. 1986), cert. denied, 479 U.S. 872 (1986) 29

Commonwealth v. Mascolo, 7 Mass. App. 275, 386 N.E.2d 1311 (1979) 14

Commonwealth v. Trainor, 374 Mass. App. 796, 374 N.E.2d 1216 (1978) 7, 13

TABLE OF AUTHORITIES – Continued

Page

Commonwealth v. United Books, 389 Mass. 888, 453 N.E.2d 406 (1983) 13

Doe v. City of Minneapolis, 393 F.Supp. 774 (D. Minn. 1988), aff'd, 898 F.2d 612 (8th Cir. 1990) 23

Fantasy Bookshop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) 23

Faretta v. California, 422 U.S. 806 (1975) 10

Flynt v. State, 153 Ga. App. 232, 264 S.E.2d 669 (1980), cert. denied, 449 U.S. 888 (1980) 14, 21

Goldberg v. Kelly, 397 U.S. 254 (1970) 10, 11

Grannis v. Ordean, 234 U.S. 385 (1914) 10

Green v. Georgia, 442 U.S. 95 (1979) 11

Hamling v. United States, 418 U.S. 87 (1974) 11, 12, 18, 19, 24, 25

Hart Bookstores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979) 23

Jacobellis v. Ohio, 378 U.S. 184 (1964) 23

Jenkins v. McKeithen, 395 U.S. 411 (1969) 11

Kaplan v. California, 413 U.S. 115 (1973) 11, 12, 18

Kolender v. Lawson, 461 U.S. 352 (1983) 28

Memoirs v. Massachusetts, 383 U.S. 413 (1966) 12

Miller v. California, 413 U.S. 15 (1973) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Mishkin v. New York, 383 U.S. 502 (1966) 8, 24, 25

Paris Adult Theatre v. Slayton, 413 U.S. 49 (1973) 15, 26

Pennsylvania v. Ritchie, 480 U.S. 39 (1987)..... 10

People v. Nelson, 88 Ill. App. 3d 196, 410 N.E.2d 476 (1980) 13, 14

Pinkus v. United States, 436 U.S. 293 (1978) ... 12, 19, 27

Pope v. Illinois, 481 U.S. 497 (1987) 27

Richards v. State, 461 N.E.2d 744 (Ind. App. 3d Dist. 1984) 16

Roth v. United States, 354 U.S. 476 (1957)..... 23

Saliba v. State, 475 N.E.2d 1181 (Ind. App. 1985) 7, 13, 21

Sedelbauer v. State, 455 N.E.2d 1159 (Ind. App. 3d Dist. 1983) 14

Smith v. California, 361 U.S. 147 (1959)....11, 15, 18, 21, 22

Smith v. United States, 431 U.S. 291 (1977)..... 3, 28

State v. Anderson, 85 N.C. App. 104, 354 S.E.2d 264 (1987), rev'd, 322 N.C. 22, 366 S.E.2d 459 (1988), cert. denied, 109 S.Ct. 792 (1989) ..... *passim*

State v. Barton, 344 N.E.2d 342 (Ohio App. 1975).... 13, 16

State v. Burgun, 56 Ohio St. 2d 354, 384 N.E.2d 255 (1978) 23

State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 109 S.Ct. 792 (1989) 13, 14, 15

State v. Short, 368 So.2d 1078 (La. 1979)..... 20

TABLE OF AUTHORITIES – Continued

Page

State v. Treadwell, 394 S.E.2d 245 (N.C. App. 1990) 28

State v. Triplett, 722 S.W.2d 246 (Mo. App. 1976)..... 23

State v. Ward, 512 S.W.2d 246 (Mo. App. 1974) 23

State ex rel. Pizza v. Strope, 54 Ohio St. 3d 41 (1990) 14, 17, 18, 28

United States v. Petrov, 747 F.2d 824 (2d Cir. 1984), cert denied, 471 U.S. 1025 (1985)..... 20

United States v. Pinkus, 579 F.2d 1174 (9th Cir. 1978), cert. dismissed, 439 U.S. 999 (1978)..... 19

United States v. Pryba, 678 F.Supp. 1225 (E.D. Va. 1988), aff'd, 900 F.2d 748, cert. denied, ___ U.S. ___ (1990) 3, 4, 7, 12

United States v. Various Articles of Obscene Merchandise, Schedule No. 2101, 709 F.2d 132 (2d Cir. 1983)..... 20, 21, 23, 28

Wall Distributing Inc. v. City of Newport News, 782 F.2d 1165 (4th Cir. 1986)..... 23

Washington v. Texas, 388 U.S. 14 (1967) 10

Womack v. United States, 294 F.2d 204 (D.C. Cir. 1961), cert. denied, 365 U.S. 859 (1961).....19, 20

Womack v. United States, 509 F.2d 368 (D.C. Cir. 1972), cert. denied, 422 U.S. 1022 (1975).....20, 21

Young v. American Mini Theatres, 427 U.S. 50..... 23

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment 1 ..... 2, 25

United States Constitution, Amendment 6 ..... 2, 10, 15

United States Constitution, Amendment 14 ... 2, 10, 11, 24

SUPREME COURT RULES:

Sup. Ct. R. 10.1 18

UNITED STATES CODE:

28 U.S.C. § 1257 2

NORTH CAROLINA STATUTES:

N.C.G.S. § 14-190.1 ..... 2, 3, 7, 25, 29

N.C.G.S. § 8C-1, Rule 401 ..... 2, 16

N.C.G.S. § 8C-1, Rule 402 ..... 2, 16

N.C.G.S. § 8C-1, Rule 403 ..... 2, 8

N.C.G.S. § 8C-1, Rule 702 ..... 2, 8, 16

N.C.P.I. § 238.10 15

MISCELLANEOUS:

Lentz, *Comparison Evidence in Obscenity Trials*, 15:1 Michigan Journal of Law Reform 45 (Fall 1981) 21

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Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the North Carolina Court of Appeals entered in the proceeding on June 5, 1990.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals entered June 5, 1990, is reported at 98 N.C. App. 628, 392 S.E.2d 136 (1990), and is reproduced as Appendix A. The July 31, 1990 order of the North Carolina Supreme Court

denying a Petition for Discretionary Review and dismissing a Notice of Appeal, is an unreported decision and is attached as Appendix B.

JURISDICTION

The order of the North Carolina Supreme Court denying a Petition for Discretionary Review and dismissing a Notice of Appeal was entered on July 31, 1990. This Petition for Certiorari is filed within ninety (90) days of that date. This Court, therefore, has jurisdiction to review the decision of the North Carolina Court of Appeals pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Sixth and Fourteenth Amendments to the United States Constitution, and North Carolina General Statutes (N.C.G.S.) § 14-190.1, § 8C-1 Rules 401, 402, 403 and 702 are set forth in Appendix C.

STATEMENT OF THE CASE

On September 26, 1988, Petitioner Cinema Blue of Charlotte, Inc. (hereinafter "Cinema Blue") was indicted on numerous charges of disseminating obscenity in violation of N.C.G.S. 14-190.1, and of conspiring to disseminate obscenity, and Petitioners St. John and Peterson were indicted on numerous charges of being accessories before the fact to the dissemination of obscenity, and of conspiring to disseminate obscenity.

At trial, following both court ordered and voluntary dismissal of several counts, the jury was left to consider the obscenity of three videotapes and one magazine.

In defense of the charges against them, Defendants sought to undertake certain sociological studies of the "contemporary community standards" to determine whether, given those standards, the materials at issue fit the legal criteria of obscenity. G.S. § 14-190.1(b); *Smith v. United States*, 431 U.S. 291, 301 (1977). To this end, Defendants engaged Dr. Joseph Scott, Professor of Sociology at Ohio State University, among others, to conduct such studies. In the past, such studies have usually consisted of public opinion polls, including telephone surveys, and ethnographic studies that would evaluate, rather than personal opinions, actual conduct in the community. However, concern as to the admissibility of such studies was raised due to a recent line of appellate decisions which had called into question such surveys as not being properly descriptive of the materials alleged to be obscene.

This concern was heightened by the fact that one of those appellate decisions emanated from the Supreme Court of North Carolina. See *State v. Anderson*, 322 N.C. 22, 366 S.E.2d 459 (1988), cert. denied, 109 S.Ct. 792 (1989), which upheld exclusion of an ethnographic study from evidence because that court had found that the study did not relate to *the specific types of materials* on trial, or those *types of materials* that were specifically limited to criminal proscription. *Id.*, 366 S.E.2d at 468. See also, *United States v. Pryba*, 678 F.Supp. 1225 (E.D. Va. 1988), aff'd, 900 F.2d 748, cert. denied, ___ U.S. ___(1990), excluding both surveys and ethnographic studies because the court there felt that the *descriptive language* of the

material contained in the telephone surveys did not adequately convey "the impact of the visual image," *id.*, at 1229, and did not sufficiently apprise the interviewees "of the nature of the charged materials," *id.*, at 1229-1230, and because the expert had not shown "the films or magazines here in issue to those he interviewed." *Id.*, at 1233.

To control for these concerns, the experts here proposed to conduct a study utilizing the actual materials alleged to be obscene, not only to obtain responses from a random sample of the community relating specifically to those materials at issue, but also to validate the descriptive language to be contained in an intended telephone survey. Direction for conducting such a study was provided by the North Carolina Court of Appeals decision in *State v. Anderson*, 354 S.E.2d 264 (1987), rev'd, 366 S.E.2d 459 (1988), cert. denied, 109 S.Ct. 513 (1988), wherein that court stated that the *best way* for an expert "to determine the impact of these [materials] on the average person in the community is to *go throughout the community showing these [materials] to various randomly selected adult community residents.*" *Id.*, at 268-269 (clarification and emphasis added). The experts here proposed to do just that.

When the issue of this study (hereinafter the "film evaluation study") was raised with the Prosecuting Attorney, he indicated that the conducting of such a study would subject both the Defendants and their expert witnesses to criminal prosecution for disseminating obscenity in violation of state law. A request for an injunction to allow the conducting of this study was made to the trial court, but was denied. Defendants then sought affirmative protective relief in the federal district court in Charlotte, which granted such relief on January 13, 1989. See *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 704

F.Supp 631 (W.D.N.C. 1989). Consistent with the injunctive order that had been entered, the film evaluation study commenced. Prior to its completion, however, the state appealed the district court decision to the Fourth Circuit. That court stayed the injunctive relief, and later reversed the district court decision on *Younger* abstention grounds. See *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49 (4th Cir. 1988), cert. denied, 110 S.Ct. 1479 (1990). Following the entry of the stay by the Fourth Circuit, the film evaluation study was terminated due to threat of prosecution of Defendants and their expert witnesses.

The State's evidence at trial as to the obscenity of the materials consisted of the admission of the materials into evidence and nothing else. The intended defense at trial primarily consisted of the *proffered* testimony of five expert witnesses: Dr. John Reed, a professor of sociology and director of the Institute for Research and Social Science at the University of North Carolina, Chapel Hill, and a Presidential appointee (by President Reagan) to the National Counsel for the Humanities; Dr. Edward Donnerstein, Professor and Chairman of the Communications Department at the University of California, Santa Barbara who is the top researcher in the country regarding the effects of sexually explicit material, who was the leadoff social science witness before the Attorney General's Commission on Pornography and who was also a member of the United States Surgeon General's Workshop on Pornography; Dr. Larry Lance, an Associate Professor of Sociology at the University of North Carolina, Charlotte; Dr. Scott; and Dr. Kenneth Land, Professor and Chairman of the Department of Sociology at Duke University, who is one of the nations top mathematical sociologists and who regularly consults for the United States Government. All of these Professors were *stipulated by the State of North*

Carolina at trial, for purposes of the proffer, to be experts in their respective fields.

These experts testified during proffer that, depending upon their respective role, they had designed, and/or supervised, and/or conducted, and/or reviewed, and/or critiqued, and/or analyzed various studies of the community standards in Mecklenburg County, so as to determine whether or not the charged materials were, given those standards, in fact obscene. These studies included a telephone survey of 407 randomly selected adult respondents, the film evaluation study in which 129 randomly selected adults from Mecklenburg County actually viewed the materials alleged to be obscene and responded to a number of questions as to the prurient appeal and patent offensiveness of such materials,[1] and a second telephone survey consisting of the responses of 200 randomly selected individuals who had rented adult materials from Defendant Cinema Blue. The unrefuted testimony of Defendants' experts confirmed that proper methodology had been utilized for each study (using such state-of-the-art procedures as control groups and tests for bias), that representative samples of the population had been obtained, that the results were trustworthy, and that the description of the material as contained in the telephone surveys was properly descriptive of the

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[1] The "sample size" of the film evaluation study would have been larger, of course, but for the threats of prosecution and the stay of the injunctive relief issued by the Fourth Circuit. Dr. Land testified, however, that sufficient data had been obtained to render this study reliable, and this evidence was unrefuted.

materials at issue, thereby relieving any concerns of the problems noted in *Anderson* and *Pryba*.[2]

Based upon these studies, Dr's. Donnerstein (designer or the film evaluation study) and Scott (who conducted the telephone surveys) testified that the average adult in Mecklenburg County, applying contemporary community standards, would not find the materials in question either appealing to the prurient interest or patently offensive.[3] The trial court, although finding

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[2] Although the propriety of the methodologies employed was neither questioned in the trial nor appellate courts, the validity of the procedures used can be verified from at least three different avenues. First, the methodologies employed are set our in great detail in the final report of those studies, proffered into evidence, which is attached as Appendix D (in the interest of brevity, irrelevant or repetitious materials are deleted from that report). Comparison of those procedures to the various appellate decisions that have outlined the foundational criteria for the admission of such evidence will substantiate the propriety of the procedures used. See, for example, *Saliba v. State*, 475 N.E.2d 1181 (Ind. App. 2 Dist. 1985) and *Commonwealth v. Trainor*, 374 Mass. 796, 374 N.E.2d 1216 (1978). Second, Dr's. Reed and Land both testified that rather than having taken part in the conducting of these studies, they had acted as "devil's advocates" to critique the methodologies employed, and had found no problems. Third, the propriety of the methodologies employed is further confirmed by the publication and acceptance of publication of these studies in such peer reviewed journals as Public Opinion Quarterly, The Journal of Law and Human Behavior, and The Journal of Law and Psychiatry. (T p. 805).

[3] One film at issue was not included in the film evaluation study, as being a gay film, it was to be judged, pursuant to statute, not by the average adult, but by the average adult homosexual. See N.C.G.S. 14-190.1(d); *Mishkin v. New York*, 383 U.S. 502, 508-509 (1966), and discussion, *infra*.

these studies relevant to at least one issue to be decided by the trier of fact (he did not indicate which one), however, excluded them in their entirety, as well as all of the expert testimony, by conclusorily noting (without any specific findings) that, pursuant to evidence Rule 702, this evidence would be of no assistance to the trier of fact[4], and that, pursuant to Rule 403, any probative value would be outweighed by its prejudice (Appendix E).

In addition, Defendants proffered testimony regarding certain "comparable" materials available and regularly sold and rented in the community, which would be indicative of the contemporary community standards, and further proffered three such materials into evidence. The trial court excluded this evidence as well for the same reasons, and for the reason that the court found the proffer of the comparison evidence to be "cumulative."

Following the exclusion of virtually the entire defense, the jury returned findings of obscenity as to the films "Video Games Vol. X, Cum and Cum Again III" and "Cum Shot Review, Vol. Four". However, they also found the film "The Big Switch" and the magazine "Pregnant and Sexy" not to be obscene. Pursuant to these findings, the jury found St. John and Peterson guilty of two counts of accessory before the fact to the dissemination of obscenity, and one count of conspiracy to disseminate obscenity. Cinema Blue was found guilty of two counts of dissemination of obscenity, and one count of conspiracy

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[4] This conclusion is of somewhat interest as the Fourth Circuit had indicated in its opinion reversing the district court's injunctive relief for the allowing of the conducting of the film evaluation study, that this was *"obviously critical evidence . . . "*. *Cinema Blue, supra*, 887 F.2d at 53 (emphasis added).

to disseminate obscenity. Petitioners St. John and Peterson were sentenced to imprisonment of two years per count, for a total imprisonment sentence of six years each, and Cinema Blue was fined $150,000.00.

Petitioners timely appealed both the convictions and sentences to the North Carolina Court of Appeals. On June 5, 1990, that court filed its opinion, affirming both the convictions and sentences without elaborating on the federal constitutional issues raised. Appendix "A". Petitioners then filed a Notice of Appeal and a Petition for Discretionary Review with the North Carolina Supreme Court. By order dated July 26, 1990, and entered July 31, 1990, that court dismissed the Notice of Appeal, and denied the Petition for Discretionary Review, without comment. Appendix "B". This Petition follows.[5]

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[5] The issue regarding the constitutional deprivations resulting from exclusion of defense evidence was raised initially in the trial court by way of motion (R pp. 120-123), which were denied by the trial court, and then raised on appeal to the North Carolina Court of Appeals (B. pp. 6-15), although the Court of Appeals failed to address these constitutional issues in their decision. The issues regarding lack of evidence to sustain the convictions was raised by motions for directed verdict and judgment notwithstanding the verdict, which were denied by the trial court and then properly raised to the Court of Appeals. The issue as to lack of proper jury instructions was first raised in the trial court by submission of the jury instructions, which were denied by the trial court, and then raised in the Court of Appeals. The issue as to the vagueness and overbreadth of the obscenity statute was raised in the trial court by way of pretrial motion, which was denied by the trial court, and then raised in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

THE ISSUE OF WHAT EVIDENCE MAY BE RELEVANT TO AND ADMISSIBLE OF CONTEMPORARY COMMUNITY STANDARDS IN AN OBSCENITY PROSECUTION IS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, AND IS AN ISSUE THAT HAS RESULTED IN CONFLICTING AND OPPOSING APPELLATE DECISIONS ACROSS THE COUNTRY.

A. The North Carolina Court of Appeals decision affirming exclusion of the totality of expert witness evidence and testimony, results in a deprivation of the fundamental right to put on a defense under the Sixth and Fourteenth Amendments, and conflicts with numerous decisions of this Court.

The confrontation and compulsory process clauses of the sixth amendment constitutionalize "the right in an adversarial criminal trial to make a defense as we know it." *Faretta v. California*, 422 U.S. 806, 818 (1975), citing *California v. Green*, 399 U.S. 149, 176 (1970) (Harlan, J., concurring). Thus, a defendant in a criminal prosecution has the right, at a minimum, to "put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This right is so fundamental that it has been implicitly incorporated into the due process clause of the fourteenth amendment. *Chambers, supra*, at 294; *Washington v. Texas*, 388 U.S. 14, 19 (1967). "The fundamental requisite of due process is the opportunity to be heard", *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970), citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), a right

that must be given "at a meaningful time and in a meaningful manner." *Goldberg, supra,* at 267, citing *Armstrong v. Manzo,* 380 U.S. 545, 552 (1962). This right becomes "particularly fundamental" when the questioned trial results in a guilty finding. *Jenkins v. McKeithen,* 395 U.S. 411, 429 (1969). Resort to states' evidence codes cannot be utilized so as to deprive a defendant of this fundamental right to present a defense. *Chambers, supra,* at 302; *Green v. Georgia,* 442 U.S. 95 (1979).

These constitutional concerns are no less applicable to one charged with violating the obscenity laws. As noted by (now Chief) Justice Rehnquist:

> "The defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce *relevant,* competent evidence bearing on the issues to be tried." *Hamling v. United States,* 418 U.S. 87, 125 (1974) (emphasis added).

It is of no constitutional import that this relevant evidence may be in the form of expert witness opinion testimony. The defendant to such a prosecution should be afforded an opportunity to "introduce *appropriate* expert testimony . . . ". *Kaplan v. California,* 413 U.S. 115, 121 (1973), citing *Smith v. California,* 361 U.S. 147, 164-165 (1959) (Frankfurter, J., concurring) (emphasis added).

While the standards of fairness under the due process clause require that a criminal defendant be afforded "a meaningful opportunity to present a *complete* defense," *California v. Trombetta,* 467 U.S. 479, 485 (1984) (emphasis added), Petitioners here were not only not afforded an opportunity to present a "complete" defense, but they were, in essence, precluded from putting forth any type of defense at all.

While unequivocally indicating the constitutional right of a defendant in a criminal obscenity prosecution to introduce "appropriate" expert testimony and "relevant" evidence, this Court has never facially addressed the issues of what is such "appropriate" expert testimony or such "relevant" evidence, or, more importantly, what testimony and evidence is so *inappropriate* or so *irrelevant* that exclusion of it does not constitute a denial of constitutional rights. This Court has peripherally noted the admissibility of expert witness testimony in criminal obscenity prosecutions in a number of its opinions in this area of the law,[6] but has never fully addressed either this evidentiary issue or the interplay between such evidentiary exclusions and the constitutional rights under the sixth and fourteenth amendments to put on a defense.

Lack of direction from this Court has resulted in appellate decisions across this country reaching conflicting and often times opposite conclusions, and have put obscenity defendants in the unenviable Catch-22 position as is found here. While some decisions mandate preclusion of the studies of the contemporary community standards because those studies do not specifically relate to or utilize the actual materials alleged to be obscene, (see, for example, *Pryba, supra,* and *Anderson, supra*), if a criminal defendant (or an expert witness), however, attempts to control for this perceived failing, and thereby utilizes the actual materials alleged to be obscene in a study, that

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[6] See, for example, *Miller v. California*, 413 U.S. 15, 31 and fn. 12 (1973); *Pinkus v. United States*, 436 U.S. 293, 296 (1978); *Kaplan, supra*, at 117; *Memoirs v. Massachusetts*, 383 U.S. 413, 415 and fn. 2 (1966); and *Hamling, supra*, at 100.

defendant or expert could be threatened, as the case here, or even charged with dissemination of obscenity.

In addition, while some lower courts have held that precluding a defendant in a criminal obscenity prosecution from putting on a defense to be reversible error[7], other courts have come to the opposite conclusion (concluding that total exclusion of a defendant's evidence

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[7] See, for example, *Commonwealth v. United Books*, 389 Mass. 888, 453 N.E.2d 406, 411-413 (1983) [" . . . it would be a rare case in which testimony from a qualified expert should be excluded on the ground that it would not be helpful to the trier of fact." *Id.*, at 412, citing *Trainor, supra,*]; *Saliba, supra* [the seminal case setting forth the foundational criteria for the admission of a public opinion poll in a criminal obscenity prosecution, holding such evidence to be *"uniquely suited"* to the determination of contemporary community standards. *Id.*, at 1185]; *Asaff v. Texas*, MA 87-48932-L (Tx. App. September 28, 1990); *Carlock v. State*, 609 S.W.2d 787, 789 (Tex.Cr.App. 1980) [holding public opinion surveys of the contemporary community standards to be "clearly relevant" as to the determination of the material facts in issue and rejecting an argument that the trial court could properly exclude such evidence in the exercise of judicial discretion]; *People v. Nelson*, 88 Ill. App. 3d 196, 410 N.E.2d 476, 479 (1980) [holding that survey results are "strong evidence" of the community standards and "may be the only way to prove degrees of acceptability . . . "]; *State v. Barton*, 344 N.E.2d 342, 350-351 (Ohio App. 1975) [holding it error to "deny or unreasonably curtail" a Defendant's rights in an obscenity case to put on a defense]. See also, the jurisdictionally relevant decision of *State v. Mayes*, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 109 S.Ct. 792 (1989) [which, although holding it to be error to have excluded the testimony regarding Dr. Terry Cole who had conducted a study of the contemporary community standards, held such exclusion to be harmless error since similar evidence and testimony had come in from another expert witness].

regarding the non-obscenity of a material is not a violation of constitutional rights)[8], or, as here, the appellate courts have simply ignored the constitutional concerns implicated and have simply, in conclusory fashion, addressed this issue solely on an evidentiary basis.[9] Disparity can also be found in the decisions of various appellate courts regarding the propriety of the questions themselves as contained in polls to measure the community standards.[10] The questions utilized in the studies here, however, directly derived from not only questions that had been found to be allowable, and thus relevant,

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[8] See, for example, *Sedelbauer v. State*, 455 N.E.2d 1159, 1164 (Ind. App. 3d Dist. 1983); *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, 672 (1980), cert. denied 449 U.S. 888 (1980).

[9] The North Carolina Court of Appeals decision on this issue, even from a purely evidentiary basis, is suspect. While that decision conclusorily indicated that the trial court has wide discretion in this area, that was not, it contended, abused here, the court only noted the testimony of Dr. Scott, and ignored the testimony of Dr.'s Land, Reed, Lance, and most importantly, Dr. Donnerstein, who designed, oversaw, and reported the results of the film evaluation study. *Cinema Blue, supra*, 392 S.E.2d at 138.

[10] Compare, for example, the survey questions found to be excludable in *Anderson, supra*, 366 S.E.2d at 467-468 *Mayes, supra*, 359 S.E.2d 35-36 and *Flynt, supra*, 264 S.E.2d at 672, but which were found to be relevant and admissible in such cases as *Asaff, supra*, slip opinion at 2 (Appendix F), and *State ex rel. Pizza v. Strope*, 54 Ohio St. 3d 41, 42 (1990) (Appendix G). On the other hand, certain other questions that were excluded in *Flynt* (at 672) were, however, found to be relevant and admissible in *Mayes* (at 35-36), *Anderson* (at 467-468) and *Nelson, supra*, 410 N.E.2d at 480. Compare also the exclusion of questions in *Flynt* and *Commonwealth v. Mascolo*, 7 Mass. App. 275, 386 N.E.2d 1311, 1314 (1979), with the propriety of such questions noted in *Saliba, supra*, at 1185-1186.

by the North Carolina Supreme Court in *Anderson, supra* and *Mayes, supra,* but also included additional questions that specifically related to legal tests of prurient appeal and patently offensive as defined by this Court.[11]

Review of these decisions illustrates the confusion that has reigned in this issue since 1973 when this Court set forth a criminal defendant's right to introduce appropriate expert testimony in *Kaplan, supra,* but at the same time, indicated in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 56 (1973), that the prosecution need not put on any form of affirmative expert evidence regarding the obscenity of the material, as no such assistance is needed by the trier of fact once the materials themselves are placed into evidence. Further confounding this problem was this Court's indication at footnote 6 of *Paris Adult* of seeming disapproval of the use of expert witness testimony in this area of the law, while at the same time, citing, in *Kaplan,* to Justice Frankfurter's concurring opinion in *Smith v. California, supra,* where Justice Frankfurter had indicated that community standards "can as a matter of fact hardly be established *except through experts.*" *Smith, supra,* at 165 (emphasis added).

While some courts have picked up on the critical distinction between *Paris Adult* and *Kaplan* (i.e., the implications raised of due process and sixth amendment

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[11] See, for example, the final report of the studies, Appendix D, Tables 4, 4a, Questions 12, 13 and 14, Tables 8, 8a and 9, Questions 9, 10, 11, and 12, and Tables 7, 7a and 8, Questions 4 and 5. Questions regarding the "tolerance" of such materials in determining the contemporary community standards were required as such a tolerance standard is mandated pursuant to the North Carolina Pattern Jury Instruction (N.C.P.I.) 238.10, which the trial court, in a pretrial matter, had indicated it would be charging to the jury.

violations by exclusion of a criminal defendant's evidence), see, for example, *Barton, supra,* at 350-351, and *Carlock, supra,* at 789, many courts have taken direction solely from *Paris Adult* and have concluded that notwithstanding a criminal defendant's constitutional right to put on a defense, a trial court has *unlimited* discretion in excluding such evidence. The case at issue is a prime example of this problem.[13]

This case presents this Court with an ideal opportunity to address this highly confused area of the law. Pursuant to the concerns addressed by appellate decisions, Defendants' experts here conducted landmark research into the area of the obscenity test, specifically addressed all methodological and legal issues, and the trial court still, in a conclusory fashion, excluded the totality of this testimony and evidence. If a study utilizing the actual materials alleged to be obscene is not admissible in a criminal prosecution, it would appear that nothing is.

Just as with the Federal Rules of Evidence, the North Carolina trial court was required to make a decision as to whether this evidence was relevant (Rule 401) and, if so, to admit that evidence, but to exclude any irrelevant evidence (Rule 402). In addition, under Rule 702, trial courts are required to determine whether the expert witness testimony and evidence "will assist" the trier of fact. The hodge podge of decisions as set forth above clearly illustrate that, because of lack of direction from this Court, there is no consensus as to what evidence and testimony (or, indeed, what questions in a study) might

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[13] See also *Richards v. State,* 461 N.E.2d 744, 747-748 (Ind. App. 3d Dist. 1984).

be relevant as to the issue of contemporary community standards, and what evidence and testimony may assist the trier of fact in determining those standards. With some courts finding various questions and studies to be relevant and to provide assistance to the trier of fact, and other courts finding the *exact same* questions and studies irrelevant and of no assistance, the need for direction from this Court becomes apparent.

Illustrative of the wide disparity of results reached by lower appellate courts throughout this country are two opinions issued immediately preceding the filing of this Petition.[14] These two decisions are particularly relevant to this case as both dealt with public opinion studies as to the contemporary community standards conducted by Dr. Joseph Scott, one of Petitioners' proffered witnesses who had conducted almost virtually identical telephone surveys here.

The first of those decisions is *State ex rel. Pizza v. Strope*, 54 Ohio St.3d 41 (1990), decided September 26, 1990. In *Strope*, the Ohio Supreme Court discusses Dr. Scott's survey, the methodologies employed and the results (at 42) and notes, in quoting the Ohio Court of Appeals' unpublished decision, that Dr. Scott's survey "was *the most relevant and probative evidence presented*" on the issue of the obscenity of the materials, and further noted that any possible questions as to the methodology employed "concerned the weight to be ascribed to that evidence and not its admissibility." *Id.*, at 46 (emphasis added). In the second decision, *Asaff v. Texas*, MA

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[14] The text of these slip opinions (both to be published) are set forth as Appendices F and G, as Petitioners were not sure that published versions would be available for this Court's review prior to the consideration of this Petition.

87-48932-L (Texas App. September 28, 1990), the Texas Court of Appeals reversed an obscenity conviction by concluding that the exclusion of an almost identical study (to the study at issue here) conducted by Dr. Scott was error.

Because of the lack of direction from this Court in this area, virtually identical studies, conducted by the *same expert*, can be found (as here) to be irrelevant and of no assistance to the trier of fact, while found (by the Ohio Supreme Court) to be the "most relevant and probative evidence presented," (as in *Strope*). At the same time, while the North Carolina appellate courts have indicated that exclusion of Dr. Scott's telephone surveys (to say nothing of the film evaluation study) was not error (as admission of such evidence was in the discretion of the trial judge), the Texas Court of Appeals finds exclusion of almost an identical study to be reversible error (in *Asaff*).

If a criminal defendant's constitutional rights are to have any meaning in the context of an obscenity prosecution, the cases as cited above illustrate that direction is needed from this Court so that trial courts have some parameters upon which to base a conclusion that certain evidence and testimony is either admissible or not. Without such direction, trial courts are simply, as was the case here, granted *unlimited discretion* to exclude any and *all* defense evidence in a criminal obscenity prosecution, and need not concern themselves with the issue of violation of a defendant's constitutional rights to put on a defense. Such deprivations would render the statements of both Mr. Justice Frankfurter and Mr. Justice Harlan in *Smith v. California, supra*, and this Court's comments in *Kaplan* and *Hamling*, to be meaningless. The disparity of decisions across this country provide sufficient basis pursuant to Sup. Ct. R. 10.1, to warrant this Court in granting Certiorari.

B. Exclusion of proffered "comparison" evidence and testimony relating thereto illustrates the need for direction from this Court regarding evidence and testimony that is relevant to, and therefore admissible of contemporary community standards.

As stated by this Court, the availability of similar material "does not *automatically*" make them admissible as tending to prove the non-obscenity of materials charged. *Hamling, supra,* at 125 (emphasis added). While mere *"availability"* does not *"automatically"* render comparison evidence admissible in a criminal obscenity prosecution, this Court has never addressed what circumstances would provide sufficient and adequate foundation for the admission of such evidence. While raised in *Pinkus, supra,* at 304-305, the disposition of that case did not require this Court to address this highly litigious "obscenity" issue. Upon remand by this Court, the Ninth Circuit, however, noted that the admission of comparison evidence has been "a subject of confusion," and that "[a]dmittedly, this is a difficult area and the standards are *ill-defined*". *United States v. Pinkus,* 579 F.2d 1174, 1175 (9th Cir. 1978), cert. dismissed, 439 U.S. 999 (1978) (emphasis added).

The "foundational requirements" for admission of comparison evidence is generally considered to be the two-part test as set forth in *Womack v. United States,* 294 F.2d 204 (D.C. Cir. 1961), cert. denied, 365 U.S. 859 (1961), which requires that the proffered comparison evidence: (1) is similar to the material at issue and (2) possesses a reasonable degree of community acceptance.[15]

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[15] Many courts, however, have discussed this second prong as requiring a showing of either acceptance, *or toleration,*

(Continued on following page)

Historically, the second foundational criteria has proven troublesome.[16] As noted by the Second Circuit:

> "Of course, a determination of the precise point at which a publication is *so widely sold and is so generally available* in the community as to warrant a finding of community acceptance is difficult to fix with assurance." *Womack v. United States*, 509 F.2d 368, 379 (D.C. Cir. 1972), cert. denied, 422 U.S. 1022 (1975) (emphasis added).

In another decision of that circuit, the court stated:

> " . . . we are uncomfortable with the circularity of the approach suggested by the Government, that, in order for defendant to place comparable photographs in evidence for the purpose of establishing community acceptance, he must first establish community acceptance." *United States v. Petrov*, 747 F.2d 824, 832 (2d Cir. 1984), cert. denied, 471 U.S. 1025 (1985).

To fulfill this murky second foundational criteria, the Petitioners proffered the actual rental figures for the proffered comparison materials, and further submitted a map showing the location in the community of over 5000 renters of x-rated videos. Such evidence *appears* sufficient under existing case law to warrant admission. See, for

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for such materials. See, for example, *Womack v. United States*, 509 F.2d 368, 379 (D.C. Cir. 1972), cert. denied, 422 U.S. 1022 (1975); *State v. Short*, 368 So.2d 1078, 1082 (La. 1979); *United States v. Petrov*, 747 F.2d 824, 831 (2d Cir. 1984); *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 136-137 (2d Cir. 1983).

[16] Satisfaction of the first foundational requirement, "similarity", was fulfilled by Dr. Scott's proffered testimony that he had reviewed both the proffered comparison evidence and the materials alleged to be obscene and found them to be comparable; i.e., they had the same type of graphic depictions of sexual conduct and the same types of sexual conduct.

example, *Flynt, supra,* 264 S.E.2d at 676 and *Saliba, supra,* 475 N.E.2d at 1190, fn. 14. See also Lentz, *Comparison Evidence in Obscenity Trials,* 15:1 Michigan Journal of Law Reform 45 (Fall 1981), at page 69.

In addition, some federal courts have indicated that while availability, *in and of itself,* may not be sufficient to establish a "reasonable degree of community acceptance," such evidence is, still, probative. See, for example, *Womack, supra,* 509 F.2d at 379; and *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102,* 709 F.2d 132, 136-137 (2d Cir. 1983). Because of the lack of direction from this Court regarding this evidentiary issue, trial courts feel free, as was the case here, to exclude such evidence, even if the questionable (and often argued impossible to meet) foundational criteria for admission has been fulfilled. The exclusion of this evidence, along with the exclusion of the expert witness testimony and surveys, illustrate that direction is needed from this Court so that the constitutional rights of Defendants in a criminal obscenity prosecution continue to have some modicum of meaning.

II.

THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS, SUSTAINING A CONVICTION WITHOUT ANY KNOWLEDGE ON THE PART OF PETITIONERS ST. JOHN AND PETERSON OF THE CONTENT OR EVEN THE EXISTENCE OF THE SPECIFIC MATERIALS ALLEGED TO BE OBSCENE, IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A statute may not impose "strict" or "absolute" criminal liability in an obscenity context due to the potential to "chill" and restrict first amendment freedoms. *Smith v. California, supra,* at 149-153. The scienter requirement first

noted by this Court in *Smith, supra,* was that the Defendant had to have knowledge of the *"contents"* of the material. *Smith, supra,* at 149. In *Hamling, supra,* this Court stated that for *federal* prosecutions, it is constitutionally sufficient to show that a defendant had knowledge of the *contents,* character and nature of the materials. *Id.,* at 123.

The evidence presented at trial here supported neither a finding of the Petitioners having knowledge of the *contents* of the materials, nor even a finding of knowledge of the *existence* of the specific materials themselves. Petitioners St. John and Peterson were not alleged to be store clerks at the business establishment, but were, rather, alleged to be out-of-town bosses or individuals engaged in connected businesses.[17] The State's scienter evidence is best described in the following trial colloquy:

> The Court: The State is going to have evidence – or I'll put it this way – *is the State going to have evidence that these Defendants, or some of them or all of them, were aware of the particular material that was sold?*
>
> Mr. Gilchrist: *No, sir The State will not have evidence that states that the specific films that will be shown to the jury as having been purchased on that particular occasion. The State will not show that the two individual Defendants [St. John and Peterson] handled or had any personal dealing with a specific item . . . ".* T. p. 153 (clarification and emphasis added)

The State then simply relied upon a showing of the *general nature* of *other* materials at the business establishment; i.e. that these Defendants knew that Cinema Blue dealt in "adult" materials.

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[17] As stated previously, St. John and Peterson were not charged with nor convicted of disseminating obscenity, but, rather, of conspiracy and being accessories before the fact.

Yet, merely because material may be erotic, sexually explicit, or even "hard-core" pornography, does not mean that those materials are *per se* obscene, or are anything other than constitutionally protected expression.[18] Sex and obscenity are simply not synonymous. *Roth v. United States*, 354 U.S. 476, 487 (1957). Therefore, the fact that Cinema Blue traded in "adult" material, in and of itself, establishes nothing. Without having knowledge of the *contents* of the *specific material* alleged to be obscene, the Petitioners can be charged with having no knowledge that any *particular material* contained depictions that might be anything other than constitutionally protected, and thus legal. The scienter requirement has been eroded to such an extent, that merely working in an "adult" bookstore can sustain such a prosecution,[19] or, as here, not even working in the store is sufficient. These decisions erode the decisions of this Court requiring notice of the *contents* of materials, and warrant acceptance of this case for review.

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[18] *Young v. American Mini Theatres*, 427 U.S. 50 (1976) at 73, (Powell, J., concurring) and at 84 (dissenting opinion of 4 Justices); *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964); *Various Articles*, 709 F.2d at 135; *Fantasy Bookshop, Inc. v. City of Boston*, 652 F.2d 1115, 1126 (1st Cir. 1981); *Hart Bookstores, Inc. v. Edmisten*, 612 F.2d 821, 825 at fn. 2 (4th Cir. 1979); *Doe v. City of Minneapolis*, 393 F.Supp. 774, 779 at fn. 11 (D. Minn. 1988), aff'd, 898 F.2d 612 (8th Cir. 1990), citing *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659, 663 (8th Cir. 1981), and *Wall Distributing Inc. v. City of Newport News*, 782 F.2d 1165, 1168 (4th Cir. 1986).

[19] See, for example, *Allen v. State*, 144 Ga. App. 233, 240 S.E.2d 754 (1977), cert. denied 439 U.S. 899 (1978); *State v. Triplett*, 722 S.W.2d 633 (Mo. App. 1976); *State v. Ward*, 512 S.W.2d 246 (Mo. App. 1974) and *State v. Burgun*, 56 Ohio St. 2d 354, 384 N.E.2d 255 (1978).

III.

THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS, IN AFFIRMING THE TRIAL COURT'S DECISION TO NOT INSTRUCT THE JURY AS TO EACH ESSENTIAL ELEMENT OF THE ALLEGED CRIME, IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND DEPRIVED PETITIONERS OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

State's Exhibit 4 at trial was a videotape film entitled "Video Games Vol. X, Cum and Cum Again III." This film is a candid, explicit film depicting various homosexual acts between two adult males, and contains absolutely no depictions of any heterosexual activity. It is a film designed for and primarily disseminated to homosexuals.[20] In *Mishkin v. New York*, 383 U.S. 502 (1966), this Court noted that such material must be judged by the material's affect upon the average member of the deviant group, rather than the public at large. *Id.*, at 508.

> " . . . [T]he primary concern with requiring a jury to apply the standard of 'the average person applying contemporary community standards' is to be certain, *so far as material is not aimed at a deviant group*, it will judged by its impact on the average person rather than a particularly susceptible or sensitive person – or indeed a totally insensitive one." *Hamling, supra*, at 129, citing *Miller v. California*, 413 U.S., at 33 (emphasis in original).

The State of North Carolina has statutorily reiterated and adopted the pronouncement in *Mishkin* in its "obscenity statute" which states, in part:

> "Obscenity *shall* be judged with reference to ordinary adults *except that* it shall be judged

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[20] The trial court referred to it as "this homo film . . . ". T. p. 968.

> with reference to children or *other especially susceptible audiences* if it appears from the *character of the material or circumstances of its dissemination* to be *especially designed for or directed to such* children or *audiences*." N.C.G.S. 14-190.1(d) (emphasis added).

It is axiomatic that due process requires that the jury be instructed as to each essential element of the crime. Defendants requested jury instructions consistent with *Mishkin* and the state statute, specifically requesting a simple charge of the statute itself. Instead, after charging the jury with the tests of prurient appeal and patent offensiveness, the trial court stated:

> "Both of these tests of obscenity that I have related to you *must be considered and judged with reference to the average adult in the community* rather than the most tolerant or most prudent (sic)." (Emphasis added) (T. p. 981).

The trial court's refusal to charge the jury with the Petitioners' proposed jury instructions, including the provisions N.C.G.S. 14-190.1(d), clearly violate the constitutional mandate as set forth by this Court in *Mishkin*, *Miller* (at 33), and *Hamling* (at 129), and thereby not only allowed, but, in fact, mandated that the trier of fact judge this particular film by its impact upon, and with regard to, the wrong reference group, that being the average adult in the community rather than the average homosexual of the community.[21] This violated Petitioners' First

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[21] This error cannot be considered to be harmless. At trial, Donald King, a leader in the Charlotte gay community, testified as a lay witness regarding this particular film's lack of appeal to the prurient interest of homosexuals, and that homosexuals would not find that film to be patently offensive. The trial court's erroneous instruction, however, required the jury to ignore this testimony.

Amendment and due process rights. The North Carolina Court of Appeals, in reviewing this issue merely stated that:

> "[The Appellants] complain that the court should have given several instructions proposed by defendants which address the scope of First Amendment protection and elements of the standard for obscenity. We have examined the instructions given by the trial Judge and find them to be sufficient. The instructions proposed by defendants but refused by the trial court were not necessary to a proper determination on the issue of obscenity." *Cinema Blue, supra,* 392 S.E.2d at 139.

IV.

WHETHER THE PROSECUTION IS REQUIRED TO PUT ON EXPERT OR OTHER TESTIMONY AND EVIDENCE AS TO THE OBSCENITY OF DEVIANT MATERIAL IS AN ISSUE THIS COURT SPECIFICALLY RESERVED IN *PARIS ADULT THEATRE I V. SLATON,* 413 U.S. 49 (1973), WHICH SHOULD NOW BE ADDRESSED BY THIS COURT.

Following presentation of the State's case, Defendants moved to dismiss the charges regarding the film "Video Games" for the reason that the State had failed to present any evidence regarding the alleged obscenity of that film. The court denied that motion. While this Court has indicated that expert testimony or other evidence as to the obscenity of materials is not necessary, once those materials are put into evidence, this Court reserved judgment in *Paris Adult, supra,* whether such evidence and testimony is necessary where the contested materials are directed at a deviant sexual group. *Paris Adult, supra,* at 56, fn. 6. This case provides an ideal opportunity for this Court to now address this issue, as to hold otherwise,

would be to accept the dubious assumption that the individual jurors could know, *beyond a reasonable doubt*, the impact of such materials upon homosexuals.

V.

SINCE THE DECISION BY THIS COURT IN *MILLER V. CALIFORNIA*, 413 U.S. 15 (1973), HISTORY HAS WELL ILLUSTRATED THAT THE PRESENT TEST FOR OBSCENITY IS VAGUE AND FAILS TO GIVE ANY CLEAR NOTICE AS TO WHAT MATERIALS MAY BE ILLEGAL AND THUS CRIMINALLY PROSCRIBABLE, AND WARRANTS REEXAMINATION OF THIS LEGAL STANDARD.

Petitioners also submit that this case is "certworthy" to reconsider and reexamine the entire area of obscenity law, and particularly the tripartite test of *Miller v. California*, 413 U.S. 15 (1973). Justice Scalia noted in his concurring opinion in *Pope v. Illinois*, 481 U.S. 497, 504-505 (1987) the need for such reexamination. Justices Stevens and Marshall have indicated that *Miller* should not only be reexamined, but should, in fact, be reversed. See, for example, *Pinkus, supra*, at 305-306, Stevens J., concurring and Brennan J., joined by Marshall J., concurring, and cases cited therein. Petitioners submitted pretrial motions challenging the constitutionally of G.S. 14-901 on both vagueness and overbreadth grounds, which were denied.

This case well illustrates the lack of sufficient constitutional safeguards of the present *Miller* test to isolate material that may be subject to criminal prosecution, and to give fair notice to potential defendants of what may be illegal. In the prosecution below, of two videotape films that contained similar types of sexual conduct and depictions thereof, one was found to be obscene, but not the other. In addition, one of the films found to be *non*-obscene, was, two months later, in the same community,

adjudicated to be obscene (*State v. Treadwell*, file Nos. 88-CRS-46918 and 46920 – now reported at 394 S.E.2d 245 (N.C. App. 1990)). While it is true that juries may reach different conclusions as to the obscenity of particular material, *Miller, supra*, at 26 fn. 9, that factual reality begs the question as to the fair notice that such a criminal statute, allowing such a result, provides. In addition, the police officers testifying at trial both stated the selection of this material for prosecution was purely *arbitrary* (T. pp. 199-200, 245-246). A statute allowing such arbitrary prosecution is surely unconstitutionally vague. See *Kolender v. Lawson*, 461 U.S. 352 (1983).[22]

Compounding the inherently vague standard of the *Miller* Test is the assumption, derived from a number of cases from this Court, that a trier of fact is some how magically imbued with knowledge of the contemporary community standards, as they are not to apply their own personal opinions or predilections. This concept is so amorphous, that this Court indicated in *Smith v. United States, supra*, that during jury voir, it was not error to preclude counsel from inquiring of the venirepersons whether they kn[illegible] the contemporary community standards or what know[illegible]dge they might have of such standards. And, of course, the prosecution is not required to put on testimony of these standards, or of any issue whatsoever regarding the obscenity of the materials. These assumptions have been resoundly criticized as being unrealistic. See, for example, *Various Articles, supra*,

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[22] Courts throughout this country have wrestled with the inherently vague standards as set forth in *Miller*, calling to question the propriety, and indeed constitutionality, of the present obscenity standard. The most recent case to raise this issue is the Ohio Supreme Court decision in *Strope, supra*, discussing the "grave misgivings regarding the nebulous and subjective nature of the *Miller* test . . . ". *Strope, supra*, at 44 footnote 2.

at 136 [referring to the "dubious assumption that the triers have their fingers on the pornographic pulse in the community . . . "]; and the Florida Supreme Court's decision of *City of Miami v. Florida Literary Distributing Corporation*, 486 So.2d 569, 572 (Fla. 1986), cert. denied, 479 U.S. 872 (1986) [referring to this assumption of the knowledge of the contemporary community standards as "a questionable legal fiction . . . "].

Even without readdressing the *Miller* tripartite test, this Court can clearly find the charging statute to be constitutionally overbroad. For example, the "serious value" prong of the obscenity test as set forth in N.C.G.S. 14-190.1(b)(3) *does not* require that the material be taken *"as a whole"*, as is required pursuant to this Court's decision of *Miller, supra*, at 23-24.

CONCLUSION

For all of the reasons noted above, this Court should accept this case for review to provide direction as to these areas of the obscenity test that have resulted in diverse and inapposite decisions being reached across the country, and to reconsider the continued validity and propriety of the present *Miller* standard for obscenity.

Respectfully submitted,

KLEIN & SHAFER P.C.
Lee J. Klein, P25186
BRADLEY J. SHAFER, P36604*
Attorney for Petitioners
4121 Okemos Road
Suite 20
Okemos, MI 48864
517-349-8666

*Counsel of Record

NELSON CASSTEVENS
602 E. Morehead Street
Charlotte, NC 28202

CALVIN MURPHY
1 North McDowell Street
Suite 210
Charlotte, NC 28204

EBEN RAWLS
730 E. Trade Street
523 Law Building
Charlotte, NC 28202

Co-counsel for Petitioners

APPENDIX A

STATE of North Carolina

v.

CINEMA BLUE OF CHARLOTTE, INC., a North Carolina Corporation, aka Cinema Blue Adult Entertainment Center, aka Cinema Blue of Charlotte, aka Cinema Blue; Jim St. John; and Curtis Rene Peterson.

No. 8926SC765.

Court of Appeals of North Carolina.

June 5, 1990.

Defendants were charged in proper bills of indictment with multiple counts of dissemination of obscenity in violation of G.S. 14-190.1 and with common law conspiracy to disseminate obscenity. Each defendant was convicted by a jury on two counts of dissemination of obscenity and one count of common law conspiracy to disseminate. At the sentencing hearing, the trial court found factors in aggravation and mitigation with respect to each offense and concluded in each case that the aggravating factors outweighed the mitigating factors. From judgments imposing prison sentences totaling six years on each individual defendant and fining defendant Cinema Blue $150,000, defendants appealed.

Atty. Gen. Lacy H. Thornburg by Sp. Deputy Atty. Gen. Harold M. White, Jr., and Asst. Atty. Gen. Thomas J. Ziko, Raleigh, for the State.

Lee J. Klein, Okemos, Mich., for defendants, appellants.

Nelson Casstevens, Jr., Charlotte, for defendant, appellant Cinema Blue of Charlotte, Inc.

George Daly, Charlotte, for defendant, appellant Jim St. John.

Calvin Murphy, Charlotte, for defendant, appellant Curtis Rene Peterson.

HEDRICK, Chief Judge.

In their first two arguments on appeal, defendants contend the trial court erred in excluding expert testimony by Dr. Joseph Scott. Defendants sought to have Dr. Scott testify as to 1) the proper community standard for obscenity in Mecklenburg County and 2) the community acceptance of other sexually explicit materials "comparable" to those which defendants were convicted of disseminating. Defendants correctly point out that "appropriate expert testimony" may be offered "to explain to juries what they otherwise would not understand" in an obscenity case. *State v. Anderson*, 322 N.C. 22, 26-28, 366 S.E.2d 459, 463, *cert. denied*, ___ U.S. ___, 109 S.Ct. 513, 102 L.Ed.2d 548 (1988). However, the trial court has wide discretion in determining whether to admit expert testimony in such cases. *Id.* We have reviewed the record on appeal and find no abuse of discretion by the trial judge in excluding this testimony. Defendants' argument has no merit.

Defendants next argue that the trial court should have sustained their objection to "evidence of events at Cinema Blue in 1985." They claim that because the trial court decided to "dismiss charges [against defendants] for conduct that occurred in 1985," testimony by Captain

Thomas Barnes of the Charlotte Police Department regarding observations and purchases he made in 1985 at Cinema Blue was more prejudicial than probative. Thus, according to defendants, such testimony should have been excluded under G.S. 8C-1 Rule 703 [sic]. We disagree.

To support a charge of conspiracy to disseminate obscenity, the State is required to prove scienter on the part of the particular defendant. To satisfy this element of the offense, each defendant must have at least a general familiarity with the sexually explicit nature of the materials in question. *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). Circumstantial evidence which suggests such familiarity is therefore admissible. In the instant case, testimony indicating that Cinema Blue had sold sexually explicit materials for several years prior to 1988 tends to show that the corporate defendant and the individual defendants, both of whom began working for Cinema Blue before 1988, were aware that the store was selling sexually explicit materials at the time of the alleged conspiracy. Consequently, the trial court properly allowed Captain Barnes' testimony.

In defendants' fourth argument, based on assignment of error number nine, they complain that "[t]he trial court erred in admitting testimony of arrests, plea bargains and prior convictions of Cinema Blue's clerks." Defendants claim this testimony violated the rule which bars convictions and guilty pleas by a codefendant from being admitted as evidence of a defendant's guilt. *State v. Campbell*, 296 N.C. 394, 250 S.E.2d 228 (1979). Nevertheless, our Supreme court has held that a guilty plea by a codefendant is admissible to show that the codefendant was not being treated too leniently in exchange for testifying

against the defendant. *State v. Rothwell*, 308 N.C. 782, 303 S.E.2d 798 (1983). Furthermore, testimony concerning prior arrests, pleas bargains, and convictions by employees of Cinema Blue is admissible under G.S. 8C-1 Rule 404(b) if it tends to show motive, opportunity, intent, preparation, plan, or knowledge on the part of a defendant. In the case at bar, testimony by Grady Burr and David Schoch, two codefendants, was properly admitted under the rule in *Rothwell* to strengthen their credibility. Testimony by Mr. Schoch and former employee Ernest Smith regarding their past arrests and plea arrangements was properly allowed because it tends to show the intent and plan on the part of defendants Cinema Blue to engage in a conspiracy to disseminate obscenity.

Defendants also contend the trial court erred "in allowing testimony of hearsay declarations of a codefendant." They argue that David Schoch was improperly allowed to repeat "incriminating statements about Defendant St. John purportedly made to him by Defendant Peterson." The essence of these alleged statements was that defendant St. John was Schoch's new boss. Nevertheless, we find no conceivable prejudice to defendants resulting from their admission. Mr. Schoch's testimony, even absent the statements in question, clearly portrays his relationship with St. John as one between employee and boss. Defendants' assignment of error is therefore overruled.

Defendants next complain the trial court acted improperly by dismissing defendant St. John's motion to sever and by allowing the State to join all defendants and charges for one trial. Defendants point out that Mr. St.

John was not alleged to have participated in a conspiracy to disseminate until after April 1987, and they argue that denial of his motion to sever, in view of evidence admitted at trial regarding events in 1985, prejudiced his defense.

G.S. 15A-926(a) allows consolidation of separate offenses for trial when the offenses charged are "based on the same act or transaction or on a series of transactions connected together or constituting parts of a single scheme or plan." Subsection (b) similarly permits joinder of separate defendants for trial when the several offenses charged are transactionally related. This requirement is satisfied when the offenses in question all arose out of a single conspiracy. *State v. Silva*, 304 N.C. 122, 282 S.E.2d 449 (1981).

In addition to the transactional requirement, the trial court must determine that none of the defendants would be deprived of a fair trial by being tried together or by facing more than one charge at the same trial. *State v. Williams*, 74 N.C.App. 695, 329 S.E.2d 705 (1985). However, when the offenses are transactionally related, the trial court's ruling on a motion for joinder of severance is discretionary and, absent a showing of abuse, will not be disturbed on appeal. *State v. Wilson*, 57 N.C.App. 444, 291 S.E.2d 830, *cert. denied*, 306 N.C. 563, 294 S.E.2d 375 (1982); *State v. Lake*, 305 N.C. 143, 286 S.E.2d 541 (1982).

In the present case, all three defendants were charged as members of a single conspiracy to disseminate obscenity. The remaining charges were all for disseminating obscenity in some capacity and clearly arose out of this conspiracy. Thus, the proper standard for review by

this Court is abuse of discretion. We have reviewed the record and find no such abuse by the trial judge in granting the State's motion for joinder or in dismissing defendant St. John's motion to sever. Defendant's argument has no merit.

Defendants next contend the trial court erred in its instructions to the jury. They complain that the court should have given several instructions proposed by defendants which address the scope of First Amendment protection and elements of the standard for obscenity. We have examined the instructions given by the trial judge and find them to be sufficient. The instructions proposed by defendants but refused by the trial court were not necessary to a proper determination on the issue of obscenity. Consequently, this assignment of error is overruled.

In assignment of error number seventeen, based on exceptions eleven through nineteen in the record, defendants claim the trial judge erred at sentencing by finding as a factor in aggravation that defendants "induced others to participate in the commission of" each offense of conspiracy to disseminate and dissemination as an accessory before the fact. Such findings, according to defendants, violated G.S. 15A-1340.4(a)(1) which provides that "[e]vidence necessary to prove an element of the offense [charged] may not be used to prove any factor in aggravation. . . . " We disagree.

While G.S. 15A-1340.4(a)(1) indeed prohibits basing an aggravating factor on circumstances essential to establishment of a defendants' guilt for a particular crime, our Supreme Court has indicated that many of the factors

listed in the statute "contemplate a duplication in proof without violating [that] proscription. . . . " *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983). In the case of a criminal conspiracy, the State must show, by competent evidence, only that the defendant entered into an agreement with one or more other persons to do an unlawful act or to do a lawful act by unlawful means or in an unlawful manner. *State v. Massey*, 76 N.C.App. 660, 334 S.E.2d 71 (1985). Although essential evidence of the agreement may also suggest that the accused induced others to participate in the conspiracy, the fact that he did so is not required to establish his guilt as a conspirator. With respect to a conviction for being an accessory before the fact, the State must show that defendant either gave advice or counsel to the principal or did some act which aided the principal in the commission of the offense. Once again, however, it does not matter that certain evidence essential to establish the giving of aid or advice by defendant also tends to show he persuaded the principal to commit the offense in question. Such duplication in proof does not prohibit the trial judge from using the evidence to find a factor in aggravation. We therefore conclude that the trial judge did not err at sentencing.

Defendants next argue that the trial court erred by denying their motions to dismiss because "[i]nsufficient evidence [was] presented to support conspiracy or accessory before the fact charges." They contend that the State failed to produce any evidence of "scienter" to support defendants' convictions.

In ruling on a motion to dismiss pursuant to G.S. 15A-1227, the trial court must consider the evidence presented in the light most favorable to the State, and the

State must be given the benefit of every reasonable inference to be drawn therefrom. *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981). If there is evidence, direct or circumstantial, from which a jury could reasonably find that defendant had committed the offense charged, the motion to dismiss must be denied. *State v. Simmons*, 57 N.C.App. 548, 291 S.E.2d 815 (1982). In the present case, the record tends to show that the Cinema Blue store sold only sexually explicit materials and that much of these materials were in plain view of anyone who entered the store. The record also indicates that the individual defendants were supervisors of the store and had visited the store on a number of occasions for business purposes. We believe that this evidence constituted sufficient proof of scienter to withstand a motion to dismiss. Defendants' argument has no merit.

Finally, defendants assign as error the trial court's denial of several pretrial motions to dismiss the charges against them arguing the G.S. 14-190.1 is unconstitutionally overbroad and vague. Nevertheless, this Court had held G.S. 14-190.1 to be neither vague nor overbroad because of the specificity with which it defines which types of "sexual conduct" are considered obscene. *Cinema I Video, Inc. v. Thornburg*, 83 N.C.App. 544, 351 S.E.2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987). This argument has no merit.

Defendant had a fair trial free from prejudicial error.

No error.

JOHNSON and EAGLES, JJ., concur.

APPENDIX B

No. 267P90 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA	)	
	)	From
v	)	Mecklenburg
CINEMA BLUE OF CHARLOTTE, INC., a North Carolina Corporation, aka CINEMA BLUE ADULT ENTERTAINMENT CENTER, aka CINEMA BLUE OF CHARLOTTE aka CINEMA BLUE; JIM ST. JOHN; and CURTIS RENE PETERSON	)	(8926SC765)

ORDER

Upon consideration of the petition filed by Defendants for Writ of Supersedeas and Temporary Stay of the judgment of the Court of Appeals, in this matter, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> "Stay dissolved. By order of the Court in conference, this the 26th day of July 1990.
>
> s/ Whichard, J.
> For the Court"

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by Defendants in this matter pursuant to G.S. 7A-30, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the appeal is

"Dismissed by order of the Court in conference, this the 26th day of July 1990.

s/ Whichard, J.
For the Court"

Upon consideration of the petition filed by Defendants in this matter for discretionary review of the decision of the North Carolina Court of appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carol[i]na Court of Appeals:

"Denied by order of the Court in conference, this the 26th day of July 1990.

/s/Whichard, J.
For the Court"

NCCLU-LF and PHE, Inc.'s Motion for Leave to File Amicus Curiae Brief:

"Dismissed as moot by order of the Court in conference, this the 26th day of July 1990.

s/ Whichard, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31st day of July 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

/s/ Peggy N. Byrd
Assistant Clerk

Copy to:

North Carolina Court of Appeals
Klein & Shafer, Attorneys at Law, For Cinema Blue of Charlotte
Mr. Harold M. White, Jr., Assistant Attorney General, For the State
Mr. R. Max Blackburn, Clerk of Superior Court
Mr. Peter S. Gilchrist, III, District Attorney

Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
Mead Data Corporation
Casstevens, Hanner, Gunter & Gordon, Attorneys at Law, For Cinema Blue of Charlotte, Inc.
Murphy & Chapman, Attorneys at Law, For Curtis Rene Peterson
Merryman, Dickson, Rawls & Ledford, Attorneys at Law For Jim St. John
Mr. Edward B. Foley, Attorney at Law, for Amicus
Mr. William G. Simpson, Jr., Attorney at Law, for Amicus

APPENDIX C

UNITED STATES CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law. . . . abridging the freedom of speech, or of the press. . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right. . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .

AMENDMENT XIV

Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C.G.S.

§ 14-190.1. Obscene literature and exhibitions.

(a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

(b) For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the

United States or the Constitution of North Carolina.

(c) As used in this Article, "sexual conduct" means:

(1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or

(2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or

(3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

(d) Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences.

(e) It shall be unlawful for any person, firm or corporation to knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.

(f) It shall be unlawful for a person, firm or corporation to advertise or otherwise promote the sale of material represented or held out by said person, firm or corporation as obscene.

(g) Violation of this section is a Class J felony.

(h) Obscene material disseminated, procured, or promoted in violation of this section is contraband. (1971, c. 405, s. 1; 1973, c. 1434, s. 1; 1985, c. 703, s. 1.)

N.C.G.S. 8C-1

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (1983, c. 701, s. 1.)

N.C.G.S. 8C-1

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible. (1983, c. 701, s. 1.)

N.C.G.S. 8C-1

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (1983, c. 701, s. 1.)

N.C.G.S. 8C-1

Rule 702. Testimony by experts.

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion. (1983, c. 701, s. 1.)

APPENDIX D

Final Report of the Mecklenburg County North Carolina Film Evaluation Project

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Date: February 19, 1989

Prepared For: Mr. Lee Klein, Attorney at Law
8252 East Lansing Rd
Suite 101
Durand, MI 48429

Prepared By: Dr. Edward Donnerstein, Chairman &
Dr. Dan Linz
Communication Studies
University of California, Santa Barbara

INTRODUCTION

The purpose of this study was to determine the contemporary community standards of adults in Mecklenburg County, North Carolina regarding sexually explicit material (as here and after defined) both generally, and with regard to five specifically identified films and a magazine, and their (the five films and a magazine) appeal to a prurient interest and their patent offensiveness. Randomly selected residents were obtained to view the sexually explicit films and the sexually explicit magazine. These residents then responded to a set of questions designed to determine the appeal of the materials viewed to a prurient interest (an unhealthy shameful, morbid interest in sex) and their patent offensiveness (whether the material so affronted contemporary community standards as to go substantially beyond the level of tolerance

regarding depiction and representation of sexual conduct).

PROCEDURE

Overview of Procedure

This study was conducted in 6 phases: 1) subject recruitment over the phone, 2) pre-film questionnaire administration, 3) film viewing, 4) post-film questionnaire administration, 5) magazine viewing, and 6) post magazine questionnaire administration.

The Sample

A sample of Mecklenburg county residents were contacted by telephone through random digit dialing. A list of random digits, not weighted by prefix, was obtained from *Survey Sampling, Inc.*, Fairfield, Connecticut. Despite the fact that a nonweighted sample produces more nonworking numbers and thus entails a more time consuming subject contact procedure, we chose this procedure due to the fact that by proceeding in this manner it gave us greater assurance that a *truly* random sample of individuals could be selected from Mecklenburg county.

Questionnaire Development

Two questionnaires were developed one to be administered after the subjects viewed a movie, the other to be completed after subjects viewed the magazine. The purpose of both questionnaires was to assess the patent offensiveness and prurient appeal of the viewed material.

The language of the questionnaires was drafted in accordance so as to be both scientifically sound and consistent with legal definitions applicable to the law of obscenity in North Carolina.

Contacting Subjects

Arrangements were made with J. Bell and Associates, a professional market research and analysis firm in Charlotte, North Carolina to contact subjects for participation in the study. Instructions were give [sic] to J. Bell and Associates regarding the methodology to be employed in recruiting potential study participants. Potential participants were administered a short interview over the phone. This interview involved four components:

1) Selection of an adult respondent in the household.

2) Assessment of demographic characteristics including: age, education, race, sex, and media consumption habits.

3) Subject recruitment "to view a movie" . . . "and fill out a questionnaire about it?"

4) Subject recruitment to view "adult X-rated sexually explicit films."

(See Appendix 1 and 2 for the telephone recruitment questionnaire and instructions to the telephone interviewers)

Once subjects agreed to participate in the study, they were informed that they would receive $50.00 upon completion of the project, which, they were told, would take about two and one half-hours. Participants were then told

to report to the 8th floor of the Law Building, 730 East Trade Street, in downtown Charlotte.

A total of 614 adults completed the initial telephone interview. Of these, 380 (61.9 percent) indicated that "yes," they would be willing to participate in a film viewing project; 8 (1.3 percent) respondents indicated they were "not sure" and; 226 (36.8 percent) declined participation.

A total of 284 (73 percent of those indicating "yes" and "not sure" from above) agreed to view an X-rated video. One hundred and four respondents (27 percent) declined to participate at this stage. Of these 284 "yes" respondents, 244 subjects were scheduled for a film viewing session. (Forty potential participants were lost at the time of the phone interview due either to scheduling difficulties, or other factors such as unwillingness to come down town in the evening).

Twenty-two subjects were scheduled but were later contacted and their viewing sessions cancelled. It was necessary to cancel these sessions because of a 4th Circuit Court Appeals ruling which stayed a preliminary injunction of the Federal District Court in N.C. pending the resolution of an appeal enjoining the law enforcement departments of N.C. from prosecuting any experts or agents for showing sexually explicit material to adults of Mecklenburg Co.

A total of 132 subjects reported for their film viewing session. One subject left once the film began and two were dismissed with payment because all video viewing set-ups were being used simultaneously. **A total of 129 subjects participated in the study.**

Assessing Volunteer Bias

It is important to point out that some groups of subjects were slightly more willing to participate in the film viewing study than others once they had been informed they may be asked to watch an X-rated film. **Table 1** shows the number and percentage of respondents who agreed to participate in the study broken down by the primary demographic variables assessed in the Phone interview – age, sex, race and education. By looking at the "agree to participate" category and comparing the percentages in this column for each demographic category we note that nonwhites were slightly more likely to volunteer than whites, males more than females and younger persons more likely to volunteer than older persons. Respondents with a moderate level of education were slightly more likely to volunteer than respondents with either higher or lower levels of education.

Comparing subjects in this study to the 1987 survey of Mecklenburg County residents

Concern existed as to the possibility of "volunteer" bias because of the differences noted above in the demographic categories. This bias, if it existed appears to be superficial, and, in any event, was substantially minimized by the time of completion of the study. Those subjects who completed the study were more demographically representative of the population as a whole than were the group of respondents who indicated that they would volunteer to participate in a study involving X-rated material. **Table 2** illustrates this point. This table compares the percentage of subjects within each demographic category for our sample of 129 study participants

with percentages within the same demographic categories obtained in The Random Digit Dial Survey of Mecklenburg County, North Carolina – 1987, conducted by Dr. Joseph E. Scott (hereafter referred to the 1987 Survey). The results of the survey as well as a copy of the survey instrument are included in **Appendix 3.**

Table 2 shows the subject assignment to film types by their **Race** (*Black or White*), **Sex** (*Male or Female*), **Age** (*40+ or 39 and under*), and **Education** (*13+ or 12th grade and below*). In the table each of these are compared to the 1987 Survey. This table indicates that in terms of race and education the sample used in the film viewing study differed from the larger 1987 survey sample by only two percentage points. The present study had a slightly higher percentage of males as participants than the previous survey. While the proportions were nearly equal for younger participants, there was an approximate 10 percent difference in the older age categories with the present study under representing older persons slightly.

Several statistical techniques are available which permit us to take these slight differences into account for each of the findings presented below. We have contacted Dr. Kenneth Land, of Duke University, North Carolina and have submitted our data to him for these analyses.

Assigning subjects to film viewing conditions

The film evaluation portion of the study began on Saturday, January 21, 1989 at 2:00 P.M. and was completed on February 8, 1989. A seven step procedure was followed for handling subjects:

1. Subject completed a consent form.
2. Subject completed pre-film questionnaire.
3. Subject watches movie.
4. Subject completed post questionnaire.
5. Subject looks at magazine.
6. Subject completed magazine questionnaire.
7. Subject is debriefed and paid.

Dr. Larry Lance, University of North Carolina – Charlotte, in addition to two research assistants, were responsible for the daily operation of the film viewing study. Dr. Lance and the [sic] his research assistants were instructed to adhere to the following subject protocol:

> You will receive a list of the subjects who will be showing up for a given day from the survey research firm who called them. This list should contain 4 pieces of demographic information: Race (black, white), sex (male, female), education (13+, 12-) and age (40+, 39-). If it does not contain this information get it either from those who do the calling or get it from their responses to the pre-movie questionnaire. You are to keep a separate diagram for each film group. Write the name of the film on the top of the form. Indicate with a letter (a, b, c etc.) each subjects' characteristics on the diagram before they arrive. In other words a black male, age 51 with less than 12 years of education shows up. He is your first subject. Place an "a" in the "black" category, an "a" in the 40+ category an "a" in the "male" category and an "a" in the 12- category for education. **Don't lose this form.**
>
> At first, the movie you have subjects view will be up to your discretion, you need only spread people of different characteristics around

for each of the films. Soon however your chart will begin to fill up and you will begin to notice gaps in certain demographic categories. When this happens start to add people with the missing characteristics to the film groups that appear to need them. Remember the idea is to have each group have some males, some females, some blacks, some whites, some over 40 some under, etc.

Never hesitate to call us if you have any questions, In fact, call us every two days and let us know how the cells are filling up.

The subjects were assigned to view either one of five sexually explicit films (*Unnatural Phenomenon* 2, *The Big Switch, How to Get A 'head', Penetration* 2, *Cumshot Revue Vol.* 4) or a nonexplicit control film (*Nothing in Common*). Table 3 presents the total number of subjects in each film condition.

Obtaining informed consent

Prior to participating in the study each subject was given a consent form to read over and sign. This document informed subjects that they would be viewing a sexually explicit X-rated adult video and a magazine of the same content. Those subjects who were to view one of the five X-rated films were given the form titled: *Agreement Form for X-Rated Video Viewing* (**Appendix 4**) while those subjects who were to be shown the control film were given the form titled: *Agreement Form for Film Viewing* (**Appendix 4**).

Prefilm Questionnaire Administration

After being assigned to their film condition, subjects were given the pre-film questionnaire and instructed to take it to one of ten separate video viewing rooms and complete it. **(See: Film Evaluation Project Questionnaire, Appendix 5).** On this questionnaire subjects were asked to indicate length of residence in Mecklenburg county, newspaper subscription, video movie consumption, cable subscription, political affiliation, political attitudes, religiosity, religious service attendance, attitudes about current events, education level, age, religious affiliation. Most important subjects were given the following instruction and asked three questions:

> **The next few questions deal with X-rated videos, and adult movies and magazines. The nudity and sex shown in these types of adult material include: nude bodies and close-up graphic depictions of a variety of sexual activities, such as sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these acts by adult performers.**
>
> Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?
>
> Tolerated 1 2 3 4 5 6 7 8 Not Tolerated
>
> Do you believe you *should* be able to see any showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?
>
> Definitely Yes 1 2 3 4 5 6 7 8 Definitely No
>
> Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing

this type of material appeal to an unhealthy, shameful or morbid interest in sex?

Definitely Yes 1 2 3 4 5 6 7 8 Definitely No

Film Viewing

Upon completing the prefilm questionnaire subjects were instructed to return it to one of the staff members. The subject was then taken back to the viewing room and shown how to turn off the Video Cassette Recorder. Subjects were instructed that when the film was over they were to turn off the VCR and report to the staff person. The staff person then started the VCR and left the room.

Post-film Questionnaire

When subjects returned from their movie viewing room they were given a post-film questionnaire and instructed to return to their room to complete it. (See: **Post Film Viewing Questionnaire, Appendix 6**).

This questionnaire assessed subject attitudes on a number of current issues including gun control, censorship and religious tolerance. Most importantly they were given the following instructions and asked the following eight questions:

> **In the first questionnaire you filled out, we asked you about X-rated videos, adult movies, and adult magazines. We said that the nudity and sex shown in these adult materials include: nude bodies and close-up graphic depictions of a variety of sexual activities. This includes: sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these acts by adult performers.**

Was the move you saw today what you expected to see given this definition of X-rated videos, adult movies and magazines?

Definitely No 1 2 3 4 5 6 7 8 Definitely Yes

The next few questions deal *only* with the X-rated video which you saw today. The scenes you saw in this film may have included nude bodies and close-up graphic depictions of a variety of sexual activities, including: sexual intercourse, ejaculation, oral sex, anal sex, group sex and variations of these acts by adult performers.

Have you ever viewed a film or video like the one you just saw?

Yes _____ No _____

If you answered Yes, about how many times in the last 5 years? _____

Do you think that the film you just saw could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at ease about sex?

Definitely Yes 1 2 3 4 5 6 7 8 Definitely No

Do you think it *is* or *is not* tolerated in your community for the average adult to see adult movies, video cassettes and magazines showing such nudity and sex if they should want to?

Tolerated 1 2 3 4 5 6 7 8 Not Tolerated

Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you should want to?

Definitely No 1 2 3 4 5 6 7 8 Definitely Yes

Would viewing this type of video material appeal to your unhealthy, shameful or morbid interest in sex?

Definitely Yes 1 2 3 4 5 6 7 8 Definitely No

Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

Definitely Yes 1 2 3 4 5 6 7 8 Definitely No

Magazine Viewing and Magazine Questionnaire Administration

After completion of the post-film questionnaire subjects were given a packet which contained the magazine *Pregnant and Sexy* and a questionnaire. They were instructed to take the packet back to their room, look at the magazine, and complete the questionnaire. (See: **Magazine Questionnaire, Appendix 7**). This questionnaire included exactly the same questions as the post-film questions listed above (except for the first question) and were given the following instructions:

> **The next few questions deal with the X-rated magazine which you just viewed. You may feel exactly the same way about the magazine you just examined as you did about the video which you viewed. If you feel the same way it is okay to give the same answers you gave on the questionnaire about the video. If you feel differently about the magazine, you can of course indicate that also.**

Subject Payment

Once the post-magazine questionnaire had been completed subjects returned the packet to the staff person. Subjects were paid $50.00 and thanked. Subjects were then asked if they had any questions about [sic] study.

The research assistants were instructed to answer each question honestly and completely.

Control film subjects

Except for the magazine viewing phase of the study and the fact that they saw a nonexplicit film (*Nothing in Common*), control subjects were treated in an identical manner to the sexually explicit film viewing subjects. In addition, the control subjects post-film questionnaire did not include questions on whether the film they viewed met the definition of an "X-Rated" film or whether the film could be used for medical sexual therapy. (See: **Post Questionnaire Appendix 6, (note [C] in upper right corner).)**

RESULTS

Subject Characteristics

Table 4 presents the percentages and means (where appropriate) for each question asked on the pre-film questionnaire for the entire sample of 129 subjects. On the average subjects in the sample have lived in Mecklenburg county for about 19 years, the majority of people subscribe both to a daily newspaper and cable television. Over 50 percent of the persons in the sample consider themselves to be politically "conservative" to "very conservative" and over 80 percent say they are "somewhat" to "very" religious. Most had completed high school, over half had some college or completed a college education, and over half were married. The ages of subjects ranged from 18 to 69 years. The majority had an annual

income over $30,000 per year although at least 20 percent indicated a yearly income under $20,000 a pear.

Table 4a presents the percentages and means (where appropriate) for each question asked on the pre-film questionnaire for the sample of 44 subjects who viewed the films *Cumshot Review Vol. 4* and *The Big Switch*. On the average subjects in the sample have lived in Mecklenburg county for about 18 years, the majority of people subscribe both to a daily newspaper and cable television. Forty-five percent of the persons in the sample consider themselves to be politically "conservative" to "very conservative" and over 80 percent indicate they are "somewhat" to "very" religious. Most had completed high school, over half had some college or completed a college education, and over half were married. The ages of subjects ranged from 18 to 62 years. The majority had an annual income over $30,000 per year although at least 20 percent indicated a yearly income under $20,000 a year.

Comparison of Attitudes About Sexually Explicit Material Between 1987 Survey and The Film Viewing Sample

Table 5 presents a comparison of percentages for responses to three questions asked in the 1987 Survey with responses from the current film study subjects. In that survey questions were specifically addressed to: 1) whether it is or is not tolerated in the community for adults to see adult magazines and movies, 2) whether or not the respondent should be allowed to see such materials, and 3) whether such materials appeal to a shameful, unhealthy or morbid interest in sex. Identical questions were asked of the film viewing study participants both *before and after film viewing* the films.

A comparison of the 1987 Survey responses and the *pre-film* viewing responses of the film viewing sample indicated that 58 percent of the 1987 Survey respondents said their community did not tolerate adult movies and magazines showing nudity and sex compared to 39 percent in the current study. Thirty one percent of the 1987 Survey respondents said that they should not be able to see such materials compared to 27 percent answering the pre-film questionnaire in the present study. However, only 20 percent of the respondents in the 1987 Survey believed that such materials appeals to an unhealthy, shameful of [sic] morbid interest in sex while 45 percent indicated this on the pre-film questionnaire in the current study.

Table 5a presents a comparison of percentages for responses to three questions asked in the 1987 Survey with responses from the film viewing subjects who viewed the two films *Cumshot Revue Vol. 4* and *The Big Switch*. A comparison of the 1987 Survey responses and the *pre-film* viewing responses of the film viewing sample indicated that 58 percent of the 1987 Survey respondents said their community did not tolerate adult movies and magazines showing nudity and sex compared to 48 percent in the current study. Thirty one percent of the 1987 Survey respondents said that they should not be able to see such materials compared to 27 percent answering the pre-film questionnaire in the present study. However, only 20 percent of the respondents in the 1987 Survey believed that such materials appeals to an unhealthy, shameful of [sic] morbid interest in sex while 50 percent indicated this on the pre-film questionnaire in the current study.

Comparison of Subject Responses Before and After Film Viewing

Table 5 also shows the responses of subjects to the three questions concerning: 1) whether it is or is not tolerated in the community for adults to see adult magazines and movies, 2) whether or not the respondent should be allowed to see such materials, and 3) whether such materials appeal to a shameful, unhealthy or morbid interest in sex, *after* they had viewed one of the films. It is important to note that subjects were instructed to answer these questions *only* with reference to the film they had viewed that day. There were no significant changes in *perception* of community tolerance or the belief that they should be able to see this type of material after the subjects had the opportunity to view the films. However, there was a substantial drop in the percentage of subjects who said that the material appealed to a shameful, morbid or unhealthy interest in sex after viewing the films. Forty-five percent of the subjects believed that such material appealed to morbid, shameful or unhealthy interest in sex before seeing the film. After they viewed the film the percentage dropped to only 19 percent.

Table 5a also shows the responses of subjects to the three questions concerning: 1) whether it is or is not tolerated in the community for adults to see adult magazines and movies, 2) whether or not the respondent should be allowed to see such materials, and 3) whether such materials appeal to a shameful, unhealthy or morbid interest in sex, *after* film viewing for the subjects who viewed the two films *Cumshot Revue Vol. 4* and *The Big Switch.*. There were no significant changes in perception of community tolerance or the belief that they should be

able see this material *after* the subjects had the opportunity to view the films. However, there was a substantial drop in the percentage of subjects who said that the material viewed appealed to a shameful, morbid or unhealthy interest in sex after viewing the films. Fifty percent of the subjects believed that [the described material] would appeal to morbid, shameful or unhealthy interest in sex before actually seeing a film. After subjects' viewed the films, this percentage dropped to only 18 percent.

Table 6 presents the before and after film comparisons on the questions concerning: 1) whether it is or is not tolerated in the community for adults to see adult magazines and movies, 2) whether or not the respondent should be allowed to see such materials, and 3) whether such materials appeal to a shameful, unhealthy or morbid interest in sex **broken down by each film viewing group.** The same results are found for each group as was found when the groups were considered together. For each of the sexually explicit film groups there was no significant change for the questions concerning perceptions of community tolerance and the belief that one should be able to see such materials. However, there was a significant decline in the percent of subjects who indicated that such materials appeal to a shameful, unhealthy or morbid interest in sex for each film group after they viewed the films.

Table 6a presents the before and after film comparisons **broken down by each film viewing group** for the film viewing subjects who viewed subjects who viewed the two films *Cumshot Revue Vol. 4* and *The Big Switch.* The same results are found for both groups as was found

when the groups were considered together. For each of the sexually explicit film groups there was no significant change for the questions concerning perceptions of community tolerance and the belief that one should be able to see such materials. However, there was a significant decline in the percent of subjects who indicated that such materials appeal to a shameful unhealthy or morbid interest in sex for each film group after they viewed the films. For the film *Cumshot Revue Vol. 4* the percentage dropped from 50 to 10 percent. For the film *The Big Switch* the percentage dropped from 54 to 25 percent. Statistical tests indicate that these differences were highly reliable (t=3.63 and t=3.26, $p<.002$ and $p<.004$ respectively).

Establishing a Community Standard by Summing Individual Responses

In order to arrive at a determination of the degree to which the average adult in Mecklenburg County tolerates adult movies, video cassettes and magazines showing explicit sexual conduct, it is useful to approach the problem from the point of view of obtaining individual opinions about what people believe they should be allowed to view and using the summation of these individual opinions to represent the average response. An analogy, not involving obscenity might be illustrative. We would be hesitant, as social scientists, to say that we can tell anything useful about the level of tolerance of a new seat belt law in the State by asking a sample of people to indicate what they *think* the level of acceptance for the new law is in their community – say on a 1 to 8 scale and then reporting on these results. A far more accurate approach would be to measure the level of acceptance for the law

for each individual in the sample – say by asking if the respondent how willing he or she is to follow the law and buckle up – again on a 1 to 8 scale. This approach has three distinct advantages: First, subjects are asked to report on the specific behavior that they think they would be willing to engage in (wearing a seatbelt) rather than reporting on some vaguely defined standard of acceptance. They are asked to report on their own behavior and what they should be allowed to do rather than guessing about the community as a whole thinks should be done; Third, once each individual response has been noted, we can look at them collectively over all of people in the sample. Calculating the mean or compiling percentages for these individual responses gives us the "average" level of acceptance for the new law.

The same argument applies to subjects *perceptions* of community tolerance versus the average response of persons to a question about what they would personally tolerate. As social scientists we place far more confidence in a procedure whereby we first ask people if they should personally be free to choose or rent a movie (a specific behavior), and then sum these individual responses in order to "take the average" (or report the percentage agreeing that the behavior should be allowed) then a procedure whereby people are asked to report on what they *perceive* what the average person would tolerate.

Analyses of responses to three questions included in the post-film questionnaire illustrates this point, and may provide us with a better understanding of what the community tolerates. We asked subjects if they thought it is, or is not, tolerated in their community for the average adult to obtain and see adult movies like the one they just

viewed. Fifty-five percent of the subjects who viewed *Cumshot Revue Vol. 4* said "yes" this adult movie is tolerated in their community. Fifty-eight percent said the same for the film *The Big Switch*. These percentages jump to 65 percent and 79 percent, respectively, when subjects are asked: "Do you think your neighbor, or you if you wanted to do so, should be free to choose to rent the movie you viewed today?" Similarly, the percentages rise to 75 percent and 71 percent when subjects were asked: "Do you believe you should be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?"

These analyses indicate that a much lower percentage of people think the hypothetical "community" tolerates the films they just viewed than is the case when people are asked to report on what they personally tolerate – in some cases by a factor of 20 percent. If we define community tolerance as the summation of individual responses about what people personally would tolerate, we would have to conclude that the community by a margin of 3 to 1 tolerates these materials.

Further Substantiation of the Findings

In order to have even higher confidence in our results, the responses to additional questions must be considered. First, concern existed as to whether or not the subjects, when completing the pre-viewing questionnaire, had in mind those type of graphic depictions of sexual conduct that were actually contained in the film that they

subsequently saw when they responded to the pre-viewing questionnaire. This concern went directly to the adequacy of the description of the content and character of the sexually explicit material about which they were questioned. The possibility existed that the subjects perception, based on this description, was different in content or character than the actual material. In order to rule out this concern, we asked them if the movie they viewed was what they had expected to see given the definition that had been provided in the pre-movie questionnaire.

Table 7 shows the percentage of subjects who felt that the movie they had just seen was, or was not, what they expected to view. When we considered their responses across all of the films, 88 percent of the subjects indicated that the materials viewed were, in fact, what they had in mind when responding to the pre-movie questionnaire. Each film group's response mirrored these results. In addition, 75 percent of the subjects indicated that they had seen a film like the one they just "seen today" sometime before. In fact, subjects reported seeing an average of 9.5 films "like the one you just saw" in the last five years (See Table 8). We conclude that subjects are very familiar with materials like those at hand and these materials conformed to the definition given to subjects in the pre-film questionnaire.

Further concern existed as to the questions that attempted to measure the communities level of tolerance of, and prurient appeal to depictions of sexually explicit material. Experience has shown that the best way to tap a subject's cognitions about a topic is to ask the same question a number of different ways. It could be argued that the three key questions (as referenced above in the

procedure section) may not have been sensitive enough to fully measure the extent of subjects feelings and beliefs about sexually explicit material. To address this possible concern, we devised and included additional questions which asked the subjects about their neighbor. These questions were: 1) If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor? 2) Do you think your neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you viewed today? 3) Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

The results of analysis of these questions can also be found in **Table 7.** These results are consistent with the results from our other questions concerning community tolerance. The results indicate that the vast majority of subjects do not see anything "wrong" with their neighbor renting the videocassette they had just viewed, nor would they feel that this material would appeal to their neighbor's unhealthy, shameful or morbid interest in sex if he or she rented this video. The vast majority also believe they themselves and their neighbor should have the right to rent this material. We therefore conclude that we have adequately measured subjects' perceptions of community tolerance and appeal to an unhealthy, shameful and morbid interest in sex.

Table 7a shows the percentage of subjects shows the percentage of subjects [sic] who felt that the movie they had just seen (either *Cumshot Revue Vol. 4* and *The Big Switch.*) was, or was not, what they expected to view. We

considered their responses across all of the films, 80 percent of the subjects indicated that the materials viewed were, in fact, what they had in mind when responding to the pre-movie questionnaire. Each film group's response mirrored these results (90 percent for *Cumshot Revue Vol. 4* and 71 percent for *The Big Switch.*). In addition, 66 percent of the subjects indicated that they had seen a film like the one they just "seen today" sometime before. In fact, subjects reported seeing an average of 6.1 films "like the one you just saw" in the last five years (See **Table 8a**). We conclude that subjects are very familiar with materials like those at hand and these materials conformed to the definition given to subjects in the pre-film questionnaire.

Further concern existed as to the questions that attempted to measure the level of community tolerance of depictions of sexually explicit material, and potential appeal to prurient interest. Experience has shown that the best way to tap a subject's cognitions about a topic is to ask the same question a number of different ways. It could be argued that the three key questions (as referenced above in the procedure section) may not have been sensitive enough to fully measure the extent of subjects feelings and beliefs about prurient interest and community tolerance. To address this possible concern, we devised and included additional questions which asked the subjects about their neighbor. These questions were: 1) If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor? 2) Do you think you neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you

viewed today? 3) Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

The results of analysis of these questions can also be found in **Table 7a.** These results are consistent with the results from our other questions concerning community tolerance. The results indicate that the vast majority of subjects do not see anything "wrong" with their neighbor renting the videocassette they had just viewed, nor would they feel that this material would appeal to their neighbor's unhealthy, shameful or morbid interest in sex if he or she rented this video. The vast majority also believe they themselves and their neighbor should have the right to rent this material. We therefore conclude that we have adequately measured subjects' perceptions of community tolerance and appeal to an unhealthy, shameful and morbid interest in sex.

Finally, it is necessary to rule out the possibility that answering the questions abut prurient appeal and patent offensiveness twice, once in the pre-film questionnaire and again in the post-film questionnaire, might have caused subjects to think more carefully about these issues than they normally would (a testing effect bias). It may be the case that the significant change from pre to post film viewing on the questionnaire item about unhealthy, shameful or morbid interest in sex was the result of subjects giving this question further consideration from the time of completing the pre-film questionnaire to the time they completed the post-film questionnaire, and not the result of changing their opinions because they had seen the film. To test this possibility we compared the

responses of the neutral film control group subjects before and after the film on this questionnaire item. The results of this statistical test revealed *no* statistically significant changes between pre and post evaluations for the control group on the patent offensiveness questions (t = 1.15, $p>.26$). The fact that we find significant changes in the subjects who view sexually explicit films but no statistically significant change for control subjects demonstrates that the observed changes were the result of viewing the movies and not an artifact of the testing situation.

Analyses of Post-Magazine Questionnaire Results

Table 9 presents the results of subject responses to the *Magazine Questionnaire*. These results are presented for each film group and the for all subjects (regardless of film groups assignment) who viewed the magazine (*Pregnant and Sexy*). It is important to remember that *only* subjects who viewed one of the X-rated films were shown the magazine and completed the post-magazine questionnaire. The results indicate that, overwhelmingly, subjects felt that they should be able to view sexual acts like those depicted in the magazine (74 percent indicating "yes" to this question). When asked if the magazine appealed to a prurient interest, 78 percent indicated that the content of the magazine did not appeal to their morbid, unhealthy, shameful interest in sex. Further, 68 percent indicated viewing this magazine would not appeal to their neighbors' morbid, unhealthy, shameful interest in sex. Nearly half of the subjects (45 percent) indicated that they had seen a magazine like the one shown to them before. On

the average, subjects reported having viewed nearly 4 magazines of this type over the last five years.

SUMMARY

The results of this study demonstrate the following:

1. That the particular films and magazine viewed by the participants do not appeal to a shameful, morbid, or unhealthy interest in sex to the average adult in Mecklenburg County, North Carolina. This conclusion is based on the results of various questions asked of the participants to determine the same, including subjects' opinions before and after they view the films in question. We see a substantial shift in opinions before and after viewing the films. Substantially fewer people felt the films appealed to a shameful, morbid or unhealthy interest in sex *after* they had an opportunity to see them than before.

2. That the particular films and magazine viewed by the participants are not patently offensive, i.e. they do not go substantially beyond the customary limits of candor (tolerance) in Mecklenburg County, North Carolina in depictions of sex. This conclusion, like before, is based on responses by participants in answers to questions relating to same.

3. The analyses indicate that a much lower percentage of people think the "community" tolerates the films they just viewed than is the case when people are asked to report on what they personally tolerate. If we assume that the summation of individual responses about what people personally would tolerate is a better indication of what the average person tolerates than asking them to

speculate on what others in the community tolerate, we would have to conclude that the community is quite tolerant of these materials.

Table 1

Comparison of Subjects who Agreed or Did Not Agree to Participate in X-rated Portion of Study as a Function of Age, Race, Sex, and Education

Race	Participate	Not Participate	Total
White	70%(1986)	30%(81)	100%(267)
Black	88%(97)	12%(13)	100%(110)
Sex			
Male	85%(115)	15%(21)	100%(136)
Female	70%(168)	30%(73)	100%(241)
Education			
12 Years or Less	73%(101)	27%(37)	100%(138)
13-15	82%(80)	18%(17)	100%(97)
16 or More	72%(102)	28%(39)	100%(141)
Age			
18-39	80%(177)	20%(43)	100%(220)
40+	67%(105)	33%(51)	100%(156)

Table 2

Comparison of Demographic Characteristics for Film Study Participants and 1987 Survey Respondents

(All Numbers are in Percent %)

	RACE		SEX		AGE			EDUCATION		
	Black	White	Male	Female	18-29	30-49	50+	12-	13-15	16+
Current Study	24	76	55	45	29	56	15	33	33	34
1987 Survey	22	78	46	54	34	41	25	34	34	32
Films										
Unnatural Phenomenon	16	84	60	40	36	56	8	32	28	40
Cumshot Revue Volume Four	20	80	45	55	45	45	10	30	30	40
The Big Switch	37	63	63	37	29	63	8	33	46	21
How to Get A'head'	25	75	60	40	5	75	20	45	15	40
Penetration 2	19	81	53	47	38	38	24	14	52	33
Control Film Nothing in Common	26	74	47	53	16	63	21	42	26	32

Table 3

Breakdown By Number of Individuals in Each Film Group

		Race		Sex		Age		Education	
FILM		Black	White	Male	Female	40+	39-	13+	12-
Unnatural Phenomenon	(N=25)	4	21	15	10	7	18	17	8
Cumshot Revue Volume Four	(N=20)	4	16	9	11	8	12	14	6
The Big Switch	(N=24)	9	15	15	9	7	17	18	6
How to Get A'head'	(N=20)	5	15	12	8	9	11	12	8
Penetration 2	(N=21)	4	17	11	10	7	14	17	4
Nothing in Common Control Film	(N=19)	5	14	9	10	11	8	12	7
Total	(N=129)	31	98	71	58	49	80	90	39

Table 4

Film Evaluation Project Questionnaire

Please answer each of the questions below as best as you can. Any answer which you give will be completely *anonymous*. In other words, no one will ever know what answer you gave to any of the questions. If you have any questions about any particular item please ask one of the staff members for assistance.

1. How long have you lived in Mecklenburg County?

19 Years 3.3 Months

2. Do you subscribe to any newspapers?

70% Yes 30% No

If yes, which newspapers? _____

3. How many movies on video cassette have you seen during the last 12 months, either in your home or elsewhere?

I have seen about 37.2 video's during the past 12 months.

4. Is your television currently connected to cable service?

76% Yes 24% No

5. Do you consider yourself to be a Democrat, Republican, Independent or something else?

52% Democrat
35% Republican
12% Independent
2% Other

6. How would you describe your attitudes on most political issues?

4% Very Conservative
48% Conservative
41% Liberal
2% Very Liberal
5% Other. Please specify _____

7. How religious would you consider yourself to be?

20% Very religious
64% Somewhat religious
13% Not very religious
2% Not at all religious

8. How often would you say you attend religious services?

28% Weekly or more
24% Once or twice a month
29% Several times a year
14% Almost never
5% Never

9. There has been considerable discussion about amending the U.S. Constitution with an Equal Rights Amendment for women. Do you favor or oppose such an Amendment?

67% Favor
16% Oppose
17% No opinion

10. Have standards changed *in your community in recent years* so that the showing of nudity and sexual activities in movies, videocassettes and magazines, available to adults only, is *more* or *less* acceptable?

59% More acceptable
41% Less acceptable

11. Are movies, videocassettes and magazines which show nudity and sex *more* or *less* acceptable than those which show violence and killing?

49% More acceptable
51% Less acceptable

The next few questions deal with X-rated videos, and adult movies and magazines. The nudity and sex shown in these types of adult material include: nude bodies and close-up graphic depictions of a variety of sexual activities, including sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these acts by adult performers.

12. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

Tolerated 1 2 3 4 5 6 7 8 **Not Tolerated**

Mean = 4.03 61% Had Scores Between 1-4

13. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

Definitely Yes 1 2 3 4 5 6 7 8 **Definitely No**

Mean = 2.93 73% Had Scores Between 1-4

14. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

Definitely Yes 1 2 3 4 5 6 7 8 **Definitely No**

Mean = 4.95 45% Had Scores Between 1-4

Finally, we need to ask you a few questions to help us compare results.

15. What was the highest grade or year of regular school or college you completed and received credit for?

2% Grade school (0-8 years).
8% Some high school (9-11 years).
23% High School Graduate (12 years).

33% Some college or technical school (13-15 years).
23% College Graduate (16 years).
11% Post graduate study (17 years or more).

16. What was your age on your last birthday?

I was 37.09 years old.

17. Do you consider yourself to be Protestant, Jewish, Catholic or some other faith?

55% Protestant.
2% Jewish.
16% Catholic.
28% Other. Please Specify _____

18. Are you married, widowed, divorced, separated, or have you never been married?

54% Married
1% Widowed
16% Divorced
5% Separated
24% Never married

19. Is your race Black, White, Hispanic, Oriental or some other?

24% Black
74% White
1% Hispanic
0% Oriental
1% Other

20. Which of the following categories includes the total income for everyone in your household last year?

5% Under $10,000
17% $10,000 to $19,999
26% $20,000 to $29,999
19% $30,000 to $39,999
13% $40,000 to $49,000
20% $50,000 or more.

Table 4a

Film Evaluation Project Questionnaire

Please answer each of the questions below as best as you can. Any answer which you give will be completely *anonymous*. In other words, no one will ever now what answer you gave to any of the questions. If you have any questions about any particular item please ask one of the staff members for assistance.

1. How long have you lived in Mecklenburg County?

18 Years 3.7 Months

2. Do you subscribe to any newspapers?

70% Yes 30% No

If yes, which newspapers? _____

3. How many movies on video cassette have you seen during the last 12 months, either in your home or elsewhere?

I have seen about 24.0 video's during the past 12 months.

4. Is your television currently connected to cable service?

86% Yes 14% No

5. Do you consider yourself to be a Democrat, Republican, Independent or something else?

61% Democrat
37% Republican
2% Independent
0% Other

6. How would you describe your attitudes on most political issues?

2% Very Conservative
43% Conservative
48% Liberal
0% Very Liberal
7% Other. Please specify _____

7. How religious would you consider yourself to be?

18% Very religious
64% Somewhat religious
18% Not very religious
0% Not at all religious

8. How often would you say you attend religious services?

23% Weekly or more
27% Once or twice a month
32% Several times a year
14% Almost never
5% Never

9. There has been considerable discussion about amending the U.S. Constitution with an Equal Rights Amendment for women. Do you favor or oppose such an Amendment?

77% Favor
11% Oppose
11% No opinion

10. Have standards changed *in your community in recent years* so that the showing of nudity and sexual activities in movies, videocassettes and magazines, available to adults only, is *more* or *less* acceptable?

52% More acceptable
48% Less acceptable

11. Are movies, videocassettes and magazines which show nudity and sex *more* or *less* acceptable than those which show violence and killing?

48% More acceptable
50% Less acceptable
2% No response

The next few questions deal with X-rated videos, and adult movies and magazines. The nudity and sex shown in these types of adult material include: nude bodies and close-up graphic depictions of a variety of sexual activities, including sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these acts by adult performers.

12. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

Tolerated 1 2 3 4 5 6 7 8 **Not Tolerated**

Mean = 4.02 52% Had Scores Between 1-4

13. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

Definitely Yes 1 2 3 4 5 6 7 8 **Definitely No**

Mean = 2.97 73% Had Scores Between 1-4

14. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

Definitely Yes 1 2 3 4 5 6 7 8 Definitely No

Mean = 4.58 50% Had Scores Between 1-4

Finally, we need to ask you a few questions to help us compare results.

15. What was the highest grade or year of regular school or college you completed and received credit for?

2% Grade school (0-8 years).
5% Some high school (9-11 years).
25% High School Graduate (12 years).
39% Some college or technical school (13-15 years).
16% College Graduate (16 years).
14% Post graduate study (17 years or more).

16. What was your age on your last birthday?

I was 34.47 years old.

17. Do you consider yourself to be Protestant, Jewish, Catholic or some other faith?

59% Protestant.
5% Jewish.
7% Catholic.
28% Other. Please Specify _____

18. Are you married, widowed, divorced, separated, or have you never been married?

59% Married
2% Widowed
7% Divorced
5% Separated
27% Never married

19. Is your race Black, White, Hispanic, Oriental or some other?

30% Black
68% White
0% Hispanic
0% Oriental
2% Other

20. Which of the following categories includes the total income for everyone in your household last year?

5% Under $10,000
16% $10,000 to $19,999
27% $20,000 to $29,999
23% $30,000 to $39,999
9% $40,000 to $49,000
20% $50,000 or more.

Table 5

Comparison of 1987 Survey with Current Study on Issues of Tolerance, Right to View Materials, and Appeal to Shameful and Morbid Interest in Sex

---

1. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

	1987 Survey	Before Film	After Film
Tolerated	42%	61%	56%
Not Tolerated	58%	39%	44%

---

2. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

	1987 Survey	Before Film	After Film
Definitely Yes	69%	73%	75%
Definitely No	31%	27%	25%

---

3. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

	1987 Survey	Before Film	After Film
Definitely Yes	20%	45%	19%
Definitely No	80%	55%	81%

Table 5a

Comparison of 1987 Survey with Current Study on Issues of Tolerance, Right to View Materials, and Appeal to Shameful and Morbid Interest in Sex (*Cumshot Review Volume Four* and *The Big Switch* Only)

---

1. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

	1987 Survey	Before Film	After Film
Tolerated	42%	52%	57%
Not Tolerated	58%	48%	43%

---

2. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

	1987 Survey	Before Film	After Film
Definitely Yes	69%	73%	73%
Definitely No	31%	27%	27%

---

3. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

	1987 Survey	Before Film	After Film
Definitely Yes	20%	50%	18%
Definitely No	80%	50%	82%

Table 6

Individuals Attitudes about Tolerance, Right to View Materials, and Appeal to Morbid or Shameful Interest in Sex Before Viewing the Film and After Viewing Film

Film Codes: **Unnatural = Unnatural Phenomenon**
Cum Shot = Cumshot Review Volume Four
Big Switch = The Big Switch
Head = How to Get A'head'
Penetration = Penetration 2
Control = Nothing in Common

1. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

Percent Yes for Tolerated

	Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
Before	60%	45%	63%	65%	62%	74%
After	60%	55%	58%	40%	48%	74%

2. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

Percent Yes

	Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
Before	80%	70%	75%	70%	76%	63%
After	92%	75%	71%	75%	76%	58%

3. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

Percent Yes

	Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
Before	32%	50%	54%	45%	38%	53%
After	12%	10%	25%	10%	24%	37%

Table 6a

Individuals Attitudes about Tolerance, Right to View Materials, and Appeal to Morbid or Shameful Interest in Sex Before Viewing the Film and After Viewing Film (*Cumshot Revue Volume Four* and *The Big Switch* Only)

---

1. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

Percent Yes for Tolerated

	Cumshot Revue Volume Four	The Big Switch
Before	45%	63%
After	55%	58%

---

2. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

Percent Yes

	Cumshot Revue Volume Four	The Big Switch
Before	70%	75%
After	75%	71%

---

3. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

Percent Yes

	Cumshot Revue Volume Four	The Big Switch
Before	**50%**	**54%**
After	**10%**	**25%**

Table 7

Individuals Attitudes About the Film Which They Viewed

Film Codes: **Unnatural = Unnatural Phenomenon**
Cum Shot = Cumshot Review Volume Four
Big Switch = The Big Switch
Head = How to Get A'head'
Penetration = Penetration 2
Control = Nothing in Common

1. If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor?

Percent yes

Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
16%	35%	33%	10%	23%	0%

2. Do you think your neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you viewed today?

Percent Yes

Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
84%	65%	79%	70%	71%	100%

3. Was the movie you saw today what you expected to see given this definition of X-rated videos, adult movies and magazines?

Percent yes

Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
96%	90%	71%	90%	95%	Not Asked

4. Do your believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

Percent Yes

Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
24%	20%	25%	20%	29%	Not Asked

5. Do you think that the film you just saw could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at ease about sex?

Percent Yes

Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
60%	40%	42%	35%	57%	Not Asked

Table 7a

Individuals Attitudes About the Film Which They Viewed (*Cumshot Review Volume Four* and *The Big Switch* Only)

1. If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor?

Percent Yes

Cumshot Revue Volume Four	The Big Switch
35%	33%

2. Do you think your neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you viewed today?

Percent Yes

Cumshot Revue Volume Four	The Big Switch
65%	79%

3. Was the movie you saw today what you expected to see given this definition of X-rated videos, adult movies and magazines?

Percent Yes

Cumshot Revue Volume Four	The Big Switch
90%	71%

4. Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

Percent Yes

Cumshot Revue Volume Four	The Big Switch
20%	25%

---

5. Do you think that the film you just saw could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at ease about sex?

Percent Yes

Cumshot Revue Volume Four	The Big Switch
40%	42%

Table 8

Post Questionnaire Responses for Individuals Who Viewed Only the Five X-Rated Films

---

1. Do you think the federal or state government has the right to keep an adult who chooses to own a gun from having one in his or her own home?

Yes 24%

---

2. Do you believe that people with certain religious beliefs *should* have the right to determine what others have available to read or view?

Yes 14%

---

3. Do you think that the federal or state government *should* have the right to keep an adult from reading or viewing what he or she wants to read or view?

Yes 36%

---

4. If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor?

Yes 24%

---

5. Do you think your neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you viewed today?

Yes 75%

---

6. Was the movie you saw today what you expected to see given this definition of X-rated videos, adult movies and magazines?

Yes 88%

The next few questions deal *only* with the X-rated video which you saw today. The scenes you saw in this film may have included nude bodies and close-up graphic depictions of a variety of sexual activities, including: sexual intercourse, ejaculation, oral sex, anal sex, group sex and variations of these acts by adult performers.

---

7. Have you ever viewed a film or video like the one you just saw?

Yes 75%

If you answered **Yes,** about how many times in the last 5 years?

Average = 9.5

---

8. Do you think that the film you just saw could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at east about sex?

Yes 47%

---

9. Do you think it *is* or *is not* tolerated in your community for the average adult to see adult movies, video cassettes and magazines showing such nudity and sex if they should want to?

Tolerated 53%

10. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you should want to?

Yes 78%

11. Did your viewing this X-rated video appeal to any unhealthy, shameful or morbid interest in sex that you might have?

Yes 16%

12. Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

Yes 24%

Table 8a

Post Questionnaire Responses for Individuals Who Viewed Only the Two X-Rated Films (*Cumshot Review Volume Four* and *The Big Switch*)

1. Do you think the federal or state government has the right to keep an adult who chooses to own a gun from having one in his or her own home?

Yes 36%

---

2. Do you believe that people with certain religious beliefs *should* have the right to determine what others have available to read or view?

Yes 16%

---

3. Do you think that the federal or state government *should* have the right to keep an adult from reading or viewing what he or she wants to read or view?

Yes 34%

---

4. If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor?

Yes 34%

---

5. Do you think your neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you viewed today?

Yes 73%

---

6. Was the movie you saw today what you expected to see given this definition of X-rated videos, adult movies and magazines?

Yes 80%

The next few questions deal *only* with the X-rated video which you saw today. The scenes you saw in this film may have included nude bodies and close-up graphic depictions of a variety of sexual activities, including: sexual intercourse, ejaculation, oral sex, anal sex, group sex and variations of these acts by adult performers.

---

7. Have you ever viewed a film or video like the one you just saw?

Yes 66%

If you answered Yes, about how many times in the last 5 years?

Average = 6.2

---

8. Do you think that the film you just saw could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at east about sex?

Yes 41%

---

9. Do you think it *is* or *is not* tolerated in your community for the average adult to see adult movies, video cassettes and magazines showing such nudity and sex if they should want to?

Tolerated 57%

10. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you should want to?

Yes 73%

11. Did your viewing this X-rated video appeal to any unhealthy, shameful or morbid interest in sex that you might have?

Yes 18%

12. Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

Yes 23%

Table 9

Individuals Attitudes about the Magazine (*Pregnant and Sexy*): Overall Percentages and Percentages as a Function of the Film Which They Viewed

Film Codes: **Unnatural = Unnatural Phenomenon**
Cum Shot = Cumshot Review Volume Four
Big Switch = The Big Switch
Head = How to Get A'head'
Penetration = Penetration 2
Control = Nothing in Common

1. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult magazines showing such nudity and sex if they should want to?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
50%	56%	50%	54%	45%	43%

2. Do you believe *you should* be able to see any such showing of actual sex acts in magazines if you should want to?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
74%	84%	65%	75%	70%	71%

3. Did viewing the material in this magazine appeal to any unhealthy, shameful or morbid interest in sex that you might have?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
22%	16%	20%	12%	30%	33%

4. Do you believe that your neighbor's viewing of this type of magazine would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
32%	28%	30%	33%	35%	33%

5. Do you think that the magazine you just examined could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at ease about sex?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
51%	60%	45%	54%	50%	43%

6. Have you ever viewed a magazine like the one you just saw?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
45%	48%	40%	50%	45%	43%

If you answered **Yes**, about how many in the last 5 years?

Mean = 3.7

Appendix 3

The Random Digit Dial Survey of Mecklenburg County, North Carolina - 1987

CONDUCTED BY:
Joseph E. Scott

TYPE SURVEY:
Random Digit Dialing Super A

NUMBERS PROVIDED BY:
Survey Sampling, Inc.
Fairfield, Connecticut

INTERVIEWING BY:
Boroughs Research
2117 McClintock Road
Charlotte, North Carolina

BRIEFING:
July 7th, 1987

INTERVIEWING DATES:
July 7th - July 16th, 1987

Interviewers:	12
Sex:	10 Females, 2 Males
Race:	4 Blacks, 8 Whites
Age:	19-45, Median 29 Years of Age
Experience:	4 Mo.-5 Years, Median 6 months

VERIFICATION
July 11, 1987 and July 27th, 1987

TOTAL NUMBERS USED:	2,290	
TOTAL DIALINGS	4,675	
NONWORKING NUMBERS:	658	
NO ANSWERS	399	
BUSINESSES	261	
NOT ELIGIBLE	105	
SUB TOTAL	1,423	
HOUSEHOLDS	875	
Language Problem	35	4.0%
Busy	38	4.3%
Answering Machine	62	7.1%
Call Back	71	8.1%
Refusals	246	28.1%
Terminations*	16	1.8%
Completed	407	46.5%

* Of the 16 terminations, 11 terminated before question 15.

A random telephone sample of households in Mecklenburg County, North Carolina was conducted. The actual interviewing began on July 7th, 1987, and was completed on the 16th of July, 1987.

The firm Boroughs Research of Charlotte, North Carolina was used as the interviewing organization. They have an impressive history of survey research work over the last several years, including clients such as the Gallup Poll, North Carolina Charlotte, the Charlotte Chamber of Commerce and several large national companies.

The interview form was reviewed with their president, Dorothy Boroughs on July 4th and again with their president and office manager, Susan Martin, on July 7th, 1987. They were informed at that time that I wanted a random household sample of adults in Mecklenburg County (one-half screened by next birthday). The sample completed was to be a minimal 400 adults.

I purchased a random digit telephone sample for the county from Survey Sampling, Inc. of Fairfield, Connecticut. Survey Sampling, Inc. is one of the most, if not the most, prestigious organization in the country in developing random samples. They calculated that 93.0 percent of the households in Mecklenburg County have telephones but that only 77.8 percent have listed numbers. To obtain accurate estimates of telephone households by county, Survey Sampling has developed a special data base beginning with the 1980 census data for residential telephone incidence. These counts are updated yearly with data on new telephone installations provided at the state

level and then applied to current projections of households by county, published annually by Sales and Marketing Management Magazine.

After a geographic area has been defined as the target, the sum of estimated telephone households is calculated and divided by the desired sample size to produce a sampling interval.

EXAMPLE: (Total estimated telephone households) 156,712

(Desired sample size) 400

INTERVAL = 392

A random number between 392 is then drawn to establish a starting point. Assuming the starting point is 10, then the 10th number, the 402nd number, the 794th number, the 1,186th number and etc. would be selected for the sample, each time stepping through the data base by a factor of 392. This is a systematic random sample – as the sample is selected in a systematic "n^{th}" fashion from a random starting point.

SELECTION OF NUMBERS AND EXCHANGES

One or more unique telephone numbers is selected by systematic sampling from among all working blocks of numbers in all telephone exchanges assigned to the county. A working block is defined as 100 contiguous numbers containing three or more residential telephone listings.

EXAMPLE: The phone number 3 5 8 3 5 9 0

Exchange Block

In this example, the exchange 358, the entire block comprises the numbers 3500-3599. Next from a random start those exchanges and working blocks falling within the interval are sampled on a systematic basis. For the random digit sample, two or more digits randomly chosen from the range 00-99 are added to each of the blocks selected. The result is a complete number made up of the exchange, the block and the two random digits.

To put it in more simple language, the sample used was random, allowing each household to have an equal opportunity of being contacted whether their number was unlisted, newly installed and not yet in the directory or whatever.

THE SURVEY STAFF

On July 7th, 1987, the survey staff of Boroughs Research was given the questionnaire and briefed on the procedures to follow. Each of them practiced administering the questionnaire to one another under observation by myself, the President and office manager before they were allowed to begin the interviewing. They did all calls from the central facility at Boroughs and had a supervisor present at all times listening and observing. I observed interviewing from the 7th-through 11th personally.

They were not informed as to what or whom the survey was for nor as to its purpose (to avoid any bias). There were 12 interviewers on the project: 2 males and 10 females; 4 blacks and 8 whites; with the youngest 19 years old and the oldest 45 years old and the median age being 29 years of age. The minimal interviewing experience of any interviewers was 4 months and the maximal 5

years with the median being 6 months experience. They completed 407 interviews in Mecklenburg County. The refusal rate for the interviews was well within state of the art parameters (11.4 percent if calculated by the numbers used divided into refusals; or 29.9% if calculated by the eligible household numbers divided into refusals and terminations; or 39.2% if calculated by refusals + terminations divided by completions + refusals + terminations.

SURVEY RESULTS

4.	How long have you lived in Mecklenburg County?	Range	1-85 Years	
		1-7 Years	129	32.1%
		8-24 Yrs	135	33.6%
		25-85 Yrs	138	34.3%
5.	I'd like to briefly talk about media. Do you subscribe to any newspaper?	Yes	288	70.8%
		No	119	29.2%
6.	Is your television currently connected to a cable service?	Yes	274	67.5%
		No	132	32.5%
7.	How many movies on video cassettes have you seen in the last year?	None	101	25.7%
		1-12	146	37.2%
		13-99	146	37.2%
8.	Are you for or against Jim and Tammy Baker regaining control of the PTL Ministry?	Favor	62	20.1%
		Neutral	55	17.9%
		Oppose	191	62.0%
9.	Should or should not teenagers be able to buy any type of music they desire?	Should	215	58.6%
		Should not	152	41.4%
10.	Do you favor or oppose the government requiring the rating of rock music records and albums?	Yes favor	257	66.2%
		No oppose	131	33.8%

11.	On a different matter, do you consider yourself to be Republican Democrat, Independent or other?	Repub.	147	37.1%
		Democrat	135	34.1
		Indep.	85	21.5%
		Other	29	7.3%
12.	Would you describe your attitudes on most political issues as very conservative, conservative, liberal or very liberal?	Very Cons.	29	7.5%
		Conservat.	191	49.2%
		Moderate	51	13.1%
		Liberal	106	27.3%
		Very Lib.	11	2.8%
13.	Would you consider yourself to be *very* religious, *somewhat* religious, *not very* religious, or *not* religious at all?	Very rel.	141	34.7%
		Somewhat	224	55.2%
		Not very	31	7.6%
		Not at all	10	2.5%
14.	How often would you say you attend religious services – every week or more, once or twice a month, a few times a year, almost never or never?	Weekly +	166	41.2%
		1-2 a mon.	112	27.8%
		Sev. yr.	77	19.1%
		Almost nev.	36	8.9%
		Never	12	3.0%
15.	Do you think the U.S. Constitution *should* or *should not* be amended with an Equal Rights Amendment?	Should	272	75.6%
		Should not	88	24.4%
16.	Have standards changed in your community recently making the showing of nudity and sexual activities in movies, video cassettes and magazines, available to adults more or less acceptable?	More accep.	182	50.8%
		Equally	27	7.5%
		Less accep.	149	41.6%
17.	Are movies, video cassettes and magazines which show nudity and sex more or less acceptable than those which show violence and killing?	More	141	38.6%
		Equal	85	23.3%
		Less	139	38.1%

The next few questions deal with X-rated videos, and adult movies and magazines. The nudity and sex shown in these types of adult materials include: nude bodies and close-up graphic depictions of a variety of sexual activities, including: sexual

intercourse, oral sex, anal sex, group sex and variations of these acts by adult performers.

18.	Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, videos, and magazines?	Yes-Tol. Not-Tol.	156 209	42.7% 57.3%
19.	Do you believe *you should* or *should not* be able to see any showing of actual sex acts in adult movies, video cassettes, or magazines?	Yes No	265 119	69.0% 31.0%
20.	Some adult movies, video cassettes and magazines show actual sex acts in detail and with close-ups of the sexual organs. Would viewing this type of material appeal to your unhealthy, shameful or morbid interest in sex?	Yes No	71 275	20.5% 79.5%
21.	What was the highest grade or year of regular school or college completed and received a grade for?	0-8 Yrs. 9-11 Yrs. 12 Yrs. 13-15 Yrs. 16 Yrs. 17+ Yrs.	7 32 100 137 103 27	1.7% 7.9% 24.6% 33.7% 25.4% 6.7%
22.	What was your age on your last birthday?	18-29 30-49 50+	133 159 100	33.9% 40.6% 25.5%
23.	How many people live in this household?	1 2 3+	51 151 223	12.5% 37.1% 49.9%
24.	How many adults, 18 years or older live in the household?	1 2 3-5	68 255 83	16.7% 62.8% 20.4%

25.	Do you consider yourself to be Protestant, Jewish, Catholic or some other faith?	Protes.	253	62.9%
		Jewish	8	2.0%
		Cath.	40	10.0%
		Other	101	25.1%
26.	Are you now married, widowed, divorced, separated, or have you never been married?	Married	225	55.4%
		Widow	28	6.9%
		Divorce	34	8.4%
		Separ	22	5.4%
		Nev. Mar.	97	23.9%
27.	Is your race white, black, hispanic, oriental or other?	White	315	77.8%
		Black	82	20.2%
		Hispanic	1	0.2%
		Other	7	1.7%
28.	Which of the following categories includes the total income for everyone in the household?	<$ 10,000	31	8.4%
		10-19,999	58	15.6%
		20-29,999	88	23.7%
		30-39,999	77	20.8%
		40-49,999	35	9.4%
		$ 50 or >+	82	22.1%
29.	Do you favor or oppose having a law in North Carolina that would permit a wife to accuse her husband of rape?	Favor	279	76.9%
		Oppose	84	23.1%
30.	Which of the following statements comes closest to your opinion about what should happen to a man who with the use of physical force or threat of such forc has sexual relations with his wife?	10 Years	67	18.0%
		1-2 Years	49	13.1%
		Few Months	30	8.0%
		Counselling	128	34.3%
		Grounds Div.	55	14.7%
		Nothing	44	11.8%
31.	Which of the following statements comes closest to your opinion about what should happen to a man who with the use of physical force or threat of such force has sexual relations wit his date?	10 Years	163	44.5%
		1-2 Years	84	23.0%
		Few Months	29	7.9%
		Counselling	53	14.5%
		Civil	23	6.3%
		Nothing	14	3.8%

32.	Sex	Male	187	45.9%
		Female	220	54.1%
36.	Call Interview Completed	1st	234	57.5%
		2-4th	173	42.5%
37.	Conversion	Yes	44	10.8%
		No	363	89.2%
40.	Screen Birthday	Yes	207	50.9%
		No	200	49.1%

COMMUNITY STANDARDS MECKLENBURG, NORTH CAROLINA

THE NEXT FEW QUESTIONS DEAL WITH X-RATED VIDEOS, AND ADULT MOVIES, AND MAGAZINES. THE NUDITY AND SEX SHOWN IN THESE TYPES OF ADULT MATERIALS INCLUDE NUDE BODIES AND CLOSE-UP GRAPHIC DEPICTIONS OF A VARIETY OF SEXUAL ACTIVITIES, INCLUDING: SEXUAL INTERCOURSE, ORAL SEX, ANAL SEX, GROUP SEX AND VARIATIONS OF THESE ACTS BY ADULT PERFORMERS.

18. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing such nudity and sex if they should want to?

TOLERATED	NOT TOLERATED	
42.7%	57.3%	
38.3%	51.4%	10.3% (DK/NA)

19. Do you believe *you should* or *should not* be able to see any showing of actual sex acts in adult movies, video cassettes, or magazines if you should want to?

SHOULD	SHOULD NOT	
69.0%	31.0%	
65.1%	29.2%	5.7%(DK/NA)

20. Some adult movies, video cassettes and magazines show actual sex acts in great detail and with close-ups of the sexual

organs. Would viewing this type of material appeal to your unhealthy, shameful or morbid interest in sex?

APPEAL	NOT APPEAL	
20.5%	79.5%	
17.4%	67.6%	15.0%(DK/NA)

SUMMARY OF RANDOM DIGIT DIAL SURVEY OF MECKLENBURG CO., N.C. KEY QUESTIONS

QUESTION #18

Do you think it is or is not tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing such nudity and sex if they should want to?

	TOLER.	NOT TOL.	DK/NA	NUMBER
ALL	42.7%	57.3%		365
ALL	38.3%	51.4%	10.3%	407
CONVERSION-Yes	50.0%	50.0%		38
CONVERSION-No	41.9%	58.1%		327
SCREEN B.D.-Yes	44.5%	55.5%		182
SCREEN B.D.-No	41.0%	59.0%		183

The response to this question indicated that the majority of respondents perceived that it was not tolerated in their community for the average adult to obtain and see adult material if they should want to. Forty-two percent (42.7%) of the respondents said it was tolerated while 57.3% indicated it was not.

EXAMINING BY 51 SUBGROUPS

In analyzing this question for the 51 subgroups, 10 of the 51 agreed that it is alright to obtain and view adult material, however, the majority of subgroups (41 of the 51) did not think it was tolerated in their community for the average adult to obtain and see adult material. The range of responses to this question by subgroup varied from a low of 31.3% for those indicating they had not

viewed a video cassette in the last year and 34.2% for those who indicated they attend religious service weekly or more to a high of 56.2% for those who indicated that their political preference was independent or other.

QUESTION #19

Do you believe *you should* or *should not* be able to see any showing of actual sex acts in adult movies, video cassettes, or magazines if you should want to?

	SHOULD	SHOULD NOT	DK/NA	NUMBER
ALL	69.0%	31.0%		384
ALL	65.1%	29.2%	5.7%	407
CONVERSION-Yes	56.1%	43.9%		41
CONVERSION-No	70.6%	29.4%		343
SCREEN B.D.-Yes	66.9%	30.1%		193
SCREEN B.D.-No	68.1%	31.9%		191

The overwhelming majority of respondents indicated that they believed they should be able to see any showing of actual sex acts in adult movies, video cassettes, or magazines if they should want to (69.0%).

EXAMINING BY 51 SUBGROUPS

In examining the results [sic] this question for the 51 subgroups, 50 of the 51 indicated that they should be able to see any showing of sex acts in movies, videos or magazines if they should want to. The range of responses to this question varied from a high of 90% of those indicated they are not very or not at all religious, and 84.1% of those who indicated that their political orientation was either

liberal or very liberal to a low of 36.0% of those individuals 50 years of age or over.

QUESTION #20

Some adult movies, video cassettes and magazines show actual sex acts in great detail and with close-ups of the sexual organs. Would viewing this type of material appeal to your unhealthy, shameful or morbid interest in sex?

	APPEAL	NOT APPEAL.	DK/NA	NUMBER
ALL	20.5%	79.5%		346
ALL	17.4%	67.6%	15.0%	407
CONVERSION-Yes	27.0%	73.0%		37
CONVERSION-No	19.7%	80.3%		309
SCREEN B.D.-Yes	15.9%	84.1%		170
SCREEN B.D.-No	25.0%	75.0%		176

The overwhelming majority of respondents indicated that viewing sexual material would not appeal to their "prurient" interest in sex. Only 20.5% of the respondents indicated that viewing such material would have this effect on them while 79.5% indicated that it would not.

EXAMINING BY 51 SUBGROUPS

In examining this question for the 51 subgroups, in not one of them did a majority of respondents indicate that viewing sexually explicit material would it appeal to their "prurient" interest in sex. The responses ranged from a low of 12.8% for those who were 50 years of age or over to a high of 28.2% for those indicating that their total household income was less than $20,000 per year.

APPENDIX E

TRIAL TRANSCRIPT:

[p. 873] THE COURT: Well, in this case, it took two days to select a jury. There were 18 challenges on each side, and in a day and a half or two days, I have heard from all of the [p. 874] expert witnesses that the defendants may call, and I have heard it in its entirety and have taken careful notes. The testimony of the expert witnesses collectively speaks to at least one of the issues that the jury is going to have to answer in this case. Of course, books have been written about at what point does an expert invade the province of the jury. There have been books written on both sides about it. Ultimately, the burden rests with the Trial Judge to determine whether or not under 702 he feels that this expert testimony would be of some assistance to the jury in making its determination, and in that, as *Anderson* has said, and many other cases, as far as I know it's always been the law in North Carolina. In that instance, the law affords the Trial Judge broad discretion. So let the record show that I have heard all of the proffered expert testimony from the defendants in the case, and I have carefully considered it. That based upon that collective expert testimony, the Court makes a finding under Rule 403 that any probative value such evidence might have would be substantially outweighed by the danger of confusion of the issues or danger of misleading the jury. The Court further finds under Rule 702 that the expert testimony would not be of any assistance, yea [sic] would probably confuse the jury, in reaching the determinations that it has to reach in this case, and I'm going to exclude all of the expert testimony from the defendants.

APPENDIX F

Reverse and Remand – Opinion filed September 28, 1990

SEAL

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-89-00781-CR

GERALD WAYNE ASAFF, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court No. 10
Dallas County, Texas
Trial Court Cause No. MA87-48932-L

OPINION

Before Justices Howell, Kinkeade, and Burnett
Opinion By Justice Howell

Gerald Wayne Asaff appeals his jury conviction for the offense of promotion of obscenity in violation of section 43.23 of the penal code. TEX. PENAL CODE ANN. § 43.23 (Vernon 1989). The jury assessed punishment at one year's confinement and a fine of $2,000. Appellant argues in his first and fourth points of error that the trial court erroneously excluded evidence regarding results of public opinion surveys and that the trial court erred in excluding from evidence magazines comparable to those

sold by appellant. We sustain these points of error and reverse accordingly.

Dallas Police Officer John B. Nichols testified that on August 6, 1987, he was working undercover when he went to the Paris Adult Bookstore and Theatre No. 1 in Dallas. While inside the store, the officer selected a package consisting of three magazines, went to the cashier's counter, and purchased the magazines from appellant. After viewing the magazines' contents, Officer Nichols arrested appellant.

In his first point of error, appellant contends that the trial court erred in excluding from evidence the results of two public opinion surveys dealing with community standards regarding sexually explicit materials. The surveys were performed by appellant's expert witness, Dr. Joseph Scott, who testified at trial about "contemporary community standards." The surveys consisted of the results of a public opinion poll regarding the community's attitudes toward sexually explicit materials. The trial court refused to admit the surveys into evidence. We determine that the exclusion of this evidence was error.

In defining that which is "obscene," the Texas Penal Code provides in pertinent part that:

> (1) "Obscene" means material or a performance that:
>
> (A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state . . . ; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

. . . .

(4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.

TEX. PENAL CODE ANN. § 43.21(a)(1), (4) (Vernon 1989).

Poll questions regarding sexually explicit materials were in pertinent part as follows:

16. Do you think standards have changed in Texas so that the showing of nudity and sexual activities in such video cassettes, movies and magazines, available to adults only, is *more* or *less* acceptable today than in recent years?

. . . .

17. Do you think it *is* or *is not* tolerated in Texas for the average adult to obtain and see adult video cassettes, movies and magazines showing nudity and sex if they should want to?

. . . .

> 18. Do you believe *you should* or *should not* be able to see any showing of actual sex acts between adults in X-rated video cassettes, or adult movies and magazines if you should want to?
>
> . . . .
>
> 19. Many neighborhood video stores in Texas have video cassettes some of which are X-rated with adult performers and show nudity and sex. *Is it* or *is it not* tolerated in Texas for these establishments to rent and/or sell X-rated videos to adults requesting such material?
>
> . . . .
>
> 20. Most adult video cassettes, movies and magazines show actual sex acts in great detail and with close-ups of the sexual organs. Would viewing this type of material cause *you* to have an unhealthy, shameful or morbid interest in sex?

(Emphasis in original.)

Appellant contends that the trial court erred in excluding the survey results from the evidence. He cites *Carlock v. State*, 609 S.W.2d 787 (Tex.Crim.App. [Panel Op.] 1980), in support of the proposition that such surveys should be admitted as relevant evidence to assist the jury in resolving the factual issue of the existing community standards concerning sexually explicit materials. The State contends that the survey results were inadmissible because some of the survey questions used the word "tolerated" rather than "accepted." The State also argues that the probative value of the survey evidence was outweighed by certain countervailing factors. *See* TEX. R. CRIM. EVID. 403. In essence, the State contends that the manner in which the questions were phrased made the

surveys inapplicable and irrelevant to a determination of what the State phrases as "acceptable" contemporary community standards.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. TEX. R. CRIM. EVID. 401. Evidence which is not relevant is inadmissible. TEX. R. CRIM. EVID. 402. Therefore, the primary question which we must decide is whether the survey results, based on the survey questions as phrased, were relevant to the issue of contemporary community standards in an obscenity prosecution. If the survey evidence was relevant, we must then determine whether it should nevertheless have been excluded under rule 403 of the rules of evidence. We note that a trial court has inherent discretion to limit the quantity and quality of evidence that an accused seeks to present in an obscenity proceeding in an attempt to establish contemporary community standards. *Berg v. State*, 599 S.W.2d 802, 807 (Tex. Crim. App. [Panel Op.] 1980). On the other hand, a defendant should be allowed to introduce appropriate evidence and expert testimony concerning a material element of the statutory definition of obscenity. *See Carlock*, 609 S.W.2d at 789.

We find little or no merit in the State's argument that the survey evidence should have been excluded because of the choice of words used in the poll questions. The State contends that because the survey questions used the word "tolerated" instead of "accepted," the survey results were inadmissible. The State maintains that, under Texas law, the issue is not whether allegedly obscene

material is "tolerated" by the community, but whether it is "accepted" by the community. However, only two of the survey questions contained this allegedly inappropriate wording. Thus, the State's reasoning would not render the entirety of the survey results inadmissible. Moreover, the State's argument is otherwise not well founded.

Although never stated directly by the State, its argument assumes that the words "accepted" and "tolerated" have materially different meanings. In the context of community standards regarding obscenity, our research indicates otherwise. We find that applicable case law uses both terms. *Compare Carlock*, 609 S.W.2d at 788 (jury must determine what is or is not *acceptable* according to contemporary community standards) *with Smith v. United States*, 431 U.S. 291, 305 (1977) (contemporary community standards must be applied by juries in accordance with their understanding of the *tolerance* of the average person in the community) *and Red Bluff Drive-in, Inc. v. Vance*, 648 F.2d 1020, 1029 (5th Cir. Unit A June 1981), *cert. denied*, 455 U.S. 913 (1982) (line between protected expression and punishable obscenity must be drawn at limits of community's *tolerance*).

The dictionary definitions of the terms "accept" and "tolerate" reveal a substantial amount of similarity, and even identity, between the two terms. For example, a definition of "accept" is to "acknowledge or recognize as appropriate, *permissible*, or inevitable," whereas "tolerate" is defined as "to *permit* the existence or practice of[;] allow without prohibition or hindrance." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11, 2405 (1981) (emphasis added). "Accept" is also defined as "to take without

protest[;] *endure* or *tolerate* with patience"; "tolerate" is also defined as "to *endure* with forbearance or restraint[;] put up with." *Id.* at 10, 2405 (emphasis added). Thus, it is clear that the words "tolerate" and "accept" can be used to refer to the same concept. Our review of the case law indicates that the two terms have in fact been used by the courts to refer to the same concept in the context of community standards concerning obscenity.

The State certainly has not made a showing that the word "tolerated" was inappropriately used in the survey questions[1]. The States does not cite one case that approved the exclusion of similar survey results based on the "reasoning" that it is "axiomatic" that tolerance does not equate with acceptability. *See United States v. Pryba*, 678 F. Supp. 1225, 1230 (E.D. Va. 1988), *aff'd*, 900 F.2d 748 (4th Cir. 1990). The *Pryba* court did not further explain its "reasoning", and we are left unpersuaded by its peremptory statements.[2]

The State notes that material is patently offensive if it affronts current community standards of "decency," not "tolerance." *See* TEX. PENAL CODE ANN.§ 43.21(a)(4) (Vernon 1989). The State also cites *Andrews v. State*, 652 S.W.2d 370, 381-82 (Tex. Crim. App. 1983), for this proposition. However, we are unable to determine why it should

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[1] We did not foreclose the possibility that a showing could be made that the words "accept" and "tolerate" have different meanings (as well as substantially similar meanings). *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 10-11, 2405. We simply observe that the State made no such showing in this case.

[2] Perhaps the *Pryba* court would have been well advised to investigate the meaning of the word "axiomatic."

follow that the survey results were inadmissible. In *Andrews*, the Court of Criminal Appeals was merely deciding the constitutionality of use of the term "decency" in the Texas statutory definition of material that is "patently offensive." The court stated that resolution of this issue did not involve the concepts of approval, respect, acceptance, or tolerance of allegedly obscene material. Instead, it involved the question of what would be *initially identified* as obscene by the average person applying contemporary community standards. *See Andrews*, 652 S.W.2d at 381. Thus, the State's attempt to substitute the concept of "decency" for "tolerance," like an accused's attempt to substitute the concept of "tolerance" for "decency," is an attempt to mix apples with oranges, and it amounts to semantic shadow-boxing. *See Hoover v. Byrd*, 801 F.2d 740, 741-42 (5th Cir. 1986).

Even if the State had demonstrated that the words "accept" and "tolerate" can be understood to have different meanings, that would not justify exclusion of the entirety of the survey results, since some of the questions did not use the word "tolerated." Moreover, we are inclined to the view that the complained of wording in the poll questions affected the weight of the evidence rather than its admissibility. *See Carlock*, 609 S.W.2d at 789-90. We determine that the survey results were relevant to resolution of the issue of contemporary community standards regarding the allegedly obscene magazines.

The State maintains that the probative value of the survey results was outweighed by the danger that the results would have been unfairly prejudicial to the State, that they would have confused the issues, and that they

would have misled the jury. In support of this argument, the State repeats its contention that the survey results are flawed because of the use of the allegedly incorrect standard of "tolerance" as opposed to "acceptance." However, the State adds no further justification for this argument; therefore, based on the foregoing discussion, we reject it.

The State also argues that, because the questions focused on the issue of whether adults should be able to see or obtain material showing nudity and sex, the jury's attention would have been diverted from the central issue regarding the nature of the material allegedly promoted in this case to the political issue of whether existing obscenity laws should be changed. We find that, at most, only two of the survey questions contain this purported flaw. Thus, this argument cannot justify exclusion of all of the survey results. Furthermore, we determine that the answers to the allegedly improper questions would be probative of current community attitudes regarding allegedly obscene material, and we do not conclude that the probative value of the answers is *substantially* outweighed by any of the countervailing factors relied on by the State. *See* TEX. R. CRIM. EVID. 403. In our view, cross-examination of appellant's expert witness and argument to the jury provide the appropriate vehicles for expression of the States's contentions regarding the survey results. The alleged weaknesses in appellant's evidence, as perceived by the State, affect the weight to be given to the evidence by the jury, but they do not render the evidence inadmissible. *See Carlock*, 609 S.W.2d at 789-90.

In accordance with *Carlock*, we determine that the trial court erred in excluding defense exhibits three and

four. Those exhibits were relevant and admissible with respect to resolution of the issue concerning contemporary community standards as to allegedly obscene materials. *See* Tex. R. Crim. Evid. 401, 402. We sustain the first point of error.

Appellant contends in the fourth point of error that the trial court erred in excluding from evidence magazines that appellant's expert witness had purchased in adult bookstores in various Texas cities. Dr. Scott testified that the magazines aided him in forming an opinion about the attitudes of average adult Texans toward sexually explicit materials. He also stated that they were comparable in nature and content to the allegedly obscene magazines that appellant was accused of promoting.

We view *Berg* as dispositive of this issue. In that case, the Court of Criminal Appeals held that it was error to exclude from the evidence nine sexually explicit *magazines* that had been purchased in and around the Dallas-Fort Worth area in a case in which the defendant was charged with commercially exhibiting an obscene *film* in Johnson County. The court reasoned that such evidence was probative of contemporary community standards concerning allegedly obscene materials. *See Berg*, 599 S.W.2d at 804-08. Based on *Berg*, we sustain the fourth point of error.[3]

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[3] Because of our disposition of the first and fourth points of error, we find it unnecessary to consider the second and third points of error. We simply note that the State would be well advised to ensure that its proofs and arguments are confined to those which are relevant to the charged offense.

We reverse the judgment and remand, the cause.

/s/ Charles Howell
CHARLES BEN HOWELL
JUSTICE

Publish
Tex. R. App. P. 90
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APPENDIX G

[54 Ohio St. 3d]

STATE, EX REL. PIZZA, *v.* STROPE

Statement of the Case

THE STATE, EX REL. PIZZA, PROSECUTING ATTORNEY, APPELLEE, *v.* STROPE ET AL., APPELLANTS.

[Cite as State, ex rel. Pizza, *v.* Strope (1990), 54 Ohio St. 3d 41.]

Appellate procedure – De novo appellate review of materials found to be obscene is applicable, when – Decision of court that sale of materials deemed not to be obscene is not subject to injunction pursuant to R.C. 3767.02 and 2907.37(B) will not be reversed unless determination upon which it is founded is against the manifest weight of the evidence.

O.Jur 3d Appellate Review §§ 595, 605.

1. Inasmuch as the purpose of *de novo* appellate review of materials found to be obscene is to protect the interests which underlie the First Amendment to the United States Constitution, such review is applicable only where there has been a prior determination that the materials at issue are, in fact, obscene.

O.Jur 3d Constitutional Law § 476.

O.Jur 3d Criminal Law §§ 1859, 1883.

2. Where a court of law has made a factual determination that materials are not obscene when measured by the standards contained in R.C. 2907.01(F), *Miller v. California* (1973), 413 U.S. 15, and *Urbana, ex rel. Newlin v. Downing* (1989), 43 Ohio St. 3d 109, 539 N.E. 2d 140, and that, consequently, the sale thereof neither violates R.C. 2907.32(A)(2) nor is subject to injunction pursuant to R.C. 3767.02 and 2907.37(B), the decision of the

court will not be reversed unless the determination upon which it is founded is against the manifest weight of the evidence. (*Seasons Coal Co. v. Cleveland* [1984], 10 Ohio St. 3d 77, 10 OBR 408, 461 N.E. 2d 1273, approved and followed.)

(Nos. 89-763 and 89-765 – Submitted April 10, 1990 – Decided September 26, 1990.)

APPEAL from the Court of Appeals for Lucas County, No. L-88-045.

Appellants are owners, operators and/or lessors of eleven retail bookstores located in Lucas County, Ohio. Between July 25, 1986 and October 6, 1986, the bookstores were visited by undercover members of the Toledo Police Department, who purchased one hundred twenty-six magazines.

On November 12, 1986, appellee Anthony G. Pizza, in his capacity as Lucas County Prosecuting Attorney, instituted the present actions pursuant to R.C. 3767.01 *et seq.* seeking a determination that the premises upon which the materials were sold constituted a nuisance and an injunction to abate their continued operation. On November 20, 1986, a motion to consolidate the eleven actions was granted.

On June 22, 1987, a bench trial commenced in the Lucas County Court of Common Pleas. In its case in chief, the state introduced evidence relating to the ownership of the businesses and the physical appearance of the bookstores. The magazines in question and stipulations acknowledging their purchase by Toledo police officers were also admitted.

Appellants presented the testimony of Dr. Elizabeth Allgeier, a professor at Bowling Green University who received her doctorate degree in social psychology. Dr. Allgeier is an expert in the field of human sexuality and has authored a textbook and several articles on the subject. Her involvement in the field has included lectures to medical students at the University of Toledo and discussions with community groups on the topic. She had been familiar with and involved in the Lucas County community for approximately seven years, while a resident of adjacent Wood County.

Prior to her testimony, Dr. Allgeier had reviewed the materials at issue. Based on this review, her expertise in the field and her knowledge of the Lucas County community, Dr. Allgeier concluded that the reaction of the average member thereof to the materials in question would include curiosity, arousal, disinterest, perplexity, edification and amusement. It was the further conclusion of Dr. Allgeier that these responses constituted normal and healthy reactions to the materials. She did not believe that these reactions indicated a shameful or morbid interest in sex.

Also testifying for appellants was Dr. Joseph Scott, Dr. Scott is a professor of sociology who teaches teaching [sic] sociology, criminology and criminal justice at the Ohio State University. He has conducted research in sexual behavior and is the author of numerous articles on the subject. In 1986, Dr. Scott conducted a random scientific survey regarding the sexual attitudes of the residents of Lucas County. The survey results indicated a widespread

acceptance of and tolerance for sexually oriented materials. Over eighty-eight percent of the respondents indicated that such materials were accepted in Lucas County and over ninety-two percent of the respondents concluded that there was tolerance for such materials. Moreover, nearly seventy-five percent of the respondents concluded that they should not be denied access to literature of this nature.

On rebuttal, the state elicited the testimony of Dr. Edward Pike, a pediatric physician specializing in eating disorders. Dr. Pike possessed no formal training in the field of human sexuality. Although Dr. Pike, in the course of his medical practice, did not encounter patients expressing a familiarity with or a reaction to sexually explicit materials, he nevertheless expressed his opinion that the magazines appealed to the prurient interest. This view was expressed despite his reluctance to express an opinion regarding what the reaction to such materials by an "average person" would be.

The state also presented the testimony of Dr. James King, a professor of sociology at the University of Toledo. During direct examination, Dr. King was generally critical of the methodology employed by Dr. Scott in conducting his survey. However, Dr. King conceded on cross-examination that his earlier criticisms did not take into account certain safeguards employed by Dr. Scott to ensure the statistical accuracy of the survey. Moreover, Dr. King acknowledged that in the past, he had employed a similar method in reporting analogous research.

Following trial, the common pleas court denied the request for injunctive relief, concluding that the state had

failed to prove that appellants had committed repeated violations of R.C. 2907.32. The trial court further determined that the state had failed to prove scienter on the part of certain appellants as required by R.C. 2907.37 and 2907.32. Finally, after considering all the evidence, the trial court concluded that the state had failed to demonstrate that the materials at issue were obscene.

On February 5, 1988, appellee appealed the trial court's determination to the court of appeals. On March 10, 1989, the court of appeals reversed in virtually all respects.[1]

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Anthony G. Pizza, prosecuting attorney, and *Steven J. Papadimos*, for appellee.

Jay E. Feldstein and *Jack Gallon*, for appellants Lee Strope and Abraham Geha.

Cooper, Straub, Walinski & Cramer and *John Czarnecki*, for appellants Richard Kaplan, Joel Kaminiski, Gary Licata, Andrea Licata, Woodville News, Inc., Donald Wiener, Arthur Davis, Junerose Davis, Sam Paget and E.G.L., Inc.

Stanley Yoder, for appellants William Bigelow and Richard Bigelow.

Sheldon Wittenberg, for appellant Modern Cinema.

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[1] The appellate court did sustain the findings of the trial court that scienter had not been proven with respect to several defendants.

Eugene Cancstraro, for appellant Florence Audrey Grayczyk, *sub. nom.* Florence Audrey Mohr.

Berkman, Gordon, Murray & Palda, J. Michael Murray, Lorraine R. Baumgardner and *Ann N. Butenhof,* for appellants Richard Kaplan, Joel Kaminski, Woodville News, Inc. and E.G.L., Inc.

Joseph Siegel, for appellant Estate of Mohamed Cheikn and Lillian Cheikn.

Lorin Zaner, for appellant Ross Properties.

Richard Szczepaniak, for appellants Joyce Ehrmin and Estate of Stanley Ehrmin.

Daniel T. Kobil, American Civil Liberties Union of Ohio Foundation, Inc. and *Elinor Alger,* urging reversal for *amicus curiae,* American Civil Liberties Union of Ohio Foundation, Inc.

Arthur M. Ney, Jr., prosecuting attorney, and *William E. Breyer,* urging affirmance for *amicus curiae,* Ohio Prosecuting Attorneys Association.

SWEENEY, J. The present action was instituted by appellee pursuant to R.C. 3767.02. This section provides:

"Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code."

"Nuisance" is defined in R.C. 3767.01(C) as follows:

"(C) 'Nuisance' means *that which is defined and declared by statutes to be such* and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department." (Emphasis added.)

R.C. 2907.37 (B) brings commercial establishments engaged in certain activities within the purview of R.C. 3767.02. It provides:

"Premises used or occupied for repeated violations of section 2907.31 or 2907.32 of the Revised Code constitute a nuisance subject to abatement pursuant to sections 3767.01 to 3767.99 of the Revised Code."

R.C. 2970.32(A)(2) provides:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

" * * *

"(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material[.]"

While "obscenity" is defined in R.C. 2907.01(F), this court, in *State v. Burgun* (1978), 56 Ohio St. 2d 354, 10 O.O. 3d 485, 384 N.E. 2d 255, observed that its scope is circumscribed by the protections embodied in the First Amendment to the United States Constitution and, specifically, the three-part test for obscenity announced in *Miller v. California* (1973), 413 U.S. 15.[2] Accordingly, in evaluating the obscene nature of materials:

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * * ; (b) whether the work depicts or describes, in a patently offense way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. * * * " *Id.* at 24.[3]

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[2] The author of this opinion continues to possess grave misgivings regarding the nebulous and subjective nature of the *Miller* test. (See *Urbana, ex rel. Newlin v. Downing* [1989], 43 Ohio St. 3d 109, 119, 539 N.E. 2d 140, 150, H. Brown, J., dissenting). Despite my view that the test is of dubious utility, it is apparent from any fair reading of *Miller* and its progeny that the standards announced therein were misapplied on appeal by the court below.

[3] In *Urbana, ex rel. Newlin v. Downing* (1989), 43 Ohio St. 3d 109, 115, 539 N.E.2d 140, 146, this court reiterated the view that

(Continued on following page)

The trier of fact in equitable proceedings (*e.g.*, nuisance abatement actions) is the trial court. In the case at bar, the court, after considering evidence presented over the course of a four-day trial, concluded that the state had failed to satisfy the first two elements of the *Miller* test. On appeal, the court of appeals conducted a de novo review of the record and reversed this factual conclusion of the trial court.

Appellee maintains that application of the aforementioned standard of review by the appellate court is supported by *Jenkins v. Georgia* (1974), 418 U.S. 153, and *Miller, supra.* This argument is without merit.

In *Jenkins,* the only discussion relative to the appropriate appellate standard was the following observation:

" * * * Even though questions of appeal to the 'prurient interest' or of patent offensiveness are 'essentially questions of fact,' it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.' Not only did we there say that *'the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary,'* 413 U.S., at 25, but we made it plain that under that holding 'no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials

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(Continued from previous page)

the test announced in *Miller* involved questions of fact. See, also, *Miller supra,* at 30; *State v. Burgun, supra,* at 357, 10 O.O. 3d at 487, 384 N.E. 2d at 259.

depict or describe patently offensive "hard core" sexual conduct. * * * ' *Id.* at 27." *Id.* at 160.

As is evident from the language employed in *Jenkins*, the principles which underlie the First Amendment are the raison d'etre for the independent appellate review envisioned therein. See *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 505.

While *Bose* was a defamation action, its reasoning has been applied by this court to obscenity cases. In *Urbana, ex rel. Newlin, v. Downing* (1989), 43 Ohio St. 3d 109, 115, 539 N.E. 2d 140, 146, it was observed:

"An appellate court must conduct an independent review of the record in a First Amendment case *'to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.' Bose, supra,* at 505. * * * ." (Emphasis added.)

Independent review by an appellate court is therefore limited to those situations where resort thereto is necessary to further the interests protected by the First Amendment. It is wholly inapplicable when those interests have been adequately protected by the judgment under appeal.

Accordingly, inasmuch as the purpose of *de novo* appellate review of materials found to be obscene is to protect the interests which underlie the First Amendment to the United States Constitution, such review is applicable only where there has been a prior determination that the materials at issue are, in fact, obscene.

Conversely, where a factfinder concludes that the materials in question are not obscene, appellate review of the finding is governed by the principles applicable to appeals of other factual issues.[4] In *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77, 10 OBR 408, 461 N.E. 2d 1273, this court emphasized that, under such circumstances, an extremely deferential standard of review must be applied:

"While we agree with the proposition that in some instances an appellate court is duty-bound to exercise the limited prerogative of reversing a judgment as being against the manifest weight of the evidence in a proper case, it is also important that in doing so a court of appeals be guided by a presumption that the findings of the trier-of-fact were indeed correct.

---

[4] With respect to intermediate appellate courts, the applicable standard is embodied in App. R. 12(C). It provides:

"In any civil action or proceeding which was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal *find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence* and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and do not find that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings; provided further that a judgment shall be reversed only once on the manifest weight of the evidence." (Emphasis added.)

"The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. The interplay between the presumption of correctness and the ability of an appellate court to reverse a trial court decision based on the manifest weight of the evidence was succinctly set forth in the holding of this court in *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St. 2d 279 [8 O.O. 3d 261]:

" 'Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.'

"See, also, *Frankenmuth Mut. Ins. Co. v. Selz* (1983), 6 Ohio St. 3d 169, 172; *In re Sekulich* (1981), 65 Ohio St. 2d 13, 16 [19 O.O. 3d 192]." 10 Ohio St. 3d at 79-80, 10 OBR at 410-411, 461 N.E. 2d at 1276.

The appellate standard expressed in *Seasons Coal Co., supra,* is the appropriate method by which to evaluate the finding of the trial court below. Where a court has made a factual determination that certain materials are not obscene when measured by the standards contained in R.C. 2907.01(F), *Miller v. California, supra,* and *Urbana, supra,* and that, consequently, the sale thereof neither violates R.C. 2907.32(A)(2) nor is subject to injunction pursuant to R.C. 3767.02 and 2907.37(B), the decision of the court will not be reversed unless the determination upon which it is founded is against the manifest weight of the evidence.

In the case at bar, the court of appeals erred by applying a standard of review which should be confined to those instances where First Amendment interests are implicated (*i.e.*, where potentially protected expression is found to be obscene). Instead, the appellate court should have limited its inquiry to whether the trial court judgment was supported by some competent credible evidence.

Appellee contends, however, that the decision of the court of appeals may nevertheless be affirmed because it implicitly recognized that the trial court judgment was against the manifest weight of the evidence. This argument misstates the holding of the appellate court. As an initial matter, the court of appeals explicitly stated that its reversal was predicated upon a de novo review of the record.

Second, appellee's characterization of the appellate court decision is contradicted by the acknowledgment by the court of appeals that " * * * Dr. Scott's survey, as critiqued by Dr. King, was the most relevant and probative evidence presented * * * " on the issue and its further observation that any objections to the validity of the survey concern the weight to be ascribed to that evidence and not its admissibility.

It is abundantly clear, therefore, that the appellate court employed an inappropriate standard of review to the findings of fact rendered by the trial court. Accordingly, the judgment of the court of appeals is reversed

and the cause is remanded thereto for application of the appellate standard announced herein.[5]

Judgment reversed
and cause remanded,

MOYER, C.J., DOUGLAS and H. BROWN, JJ., concur.

HOLMES, WRIGHT and RESNICK, JJ., concur in the syllabus and judgment.

ALICE ROBIE RESNICK, J., concurring. I concur in the syllabus and judgment of the majority but write separately. I believe that it is inappropriate for this court to comment upon any facet of the evidence involved in this case at this juncture since we are remanding the case to the appellate court for application of the correct standard of review.

The trial court found the material in question not to be obscene, hence, a *de novo* review by the appellate court was inappropriate. Rather, the appellate court should make a careful review of the entire record to determine

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[5] Inasmuch as the scienter requirement of R.C. 2907.32 is dependent upon knowledge that the materials in question are obscene and that the injunctive relief available under R.C. 2907.37(B) is dependent upon repeated violations of R.C. 2907.32, the applicability of these provisions to the facts of this case must necessarily await further review of the trial court's determination by the court of appeals. Applying the appropriate standard of review, the appellate court must initially determine whether there is sufficient evidence of obscenity prior to reaching any conclusions regarding the application of R.C. 2907.32 and 2907.37(B). This analytical process must therefore be completed by the court of appeals before these issues are properly presented for our consideration.

whether in fact the judgment of the lower court is against the manifest weight of the evidence.

Therefore, I would simply remand the case to the appellate court without comment upon any portion of the evidence so that the appellate court may objectively review the record applying the appropriate standard of review as we have directed.

HOLMES and WRIGHT, JJ., concur in the foregoing opinion.

(2)

Supreme Court, U.S.
FILED
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No. 90-675

In The

Supreme Court of the United States

October Term, 1990

CINEMA BLUE OF CHARLOTTE, INC., a North Carolina Corporation, aka CINEMA BLUE ADULT ENTERTAINMENT CENTER, aka CINEMA BLUE OF CHARLOTTE, aka CINEMA BLUE, JIM ST. JOHN AND CURTIS RENE PETERSON,

Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

BRIEF IN OPPOSITION

LACY H. THORNBURG
Attorney General
RICHARD N. LEAGUE*
Special Deputy Attorney General
Post Office Box 629
Raleigh, North Carolina
27602-0629
(919) 733-3109
Attorneys for Respondent

*Member of the Supreme Court Bar;
Counsel of Record.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUPPLEMENTAL STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

I. CERTIORARI SHOULD NOT ISSUE TO REVIEW PETITIONERS' FIRST COMPLAINT. THE OPINION EVIDENCE AND SURVEY WERE PERMISSIBLY EXCLUDED UNDER THE DECISIONS OF THIS COURT, DUE PRIMARILY TO THE TENUOUS PROBATIVE VALUE INHERENT IN THE EVIDENCE, AND SECONDARILY TO ITS NEUTRAL-TO-NEGATIVE RESULTS IN THIS PARTICULAR CASE 6

II. CERTIORARI SHOULD NOT ISSUE TO REVIEW PETITIONERS' SECOND COMPLAINT. THE COMPARISON EVIDENCE OFFERED TO SHOW CONTEMPORARY COMMUNITY STANDARDS, HAD ONLY A 1.2% DEMONSTRABLE ACCEPTANCE AND WAS LIMITED TO THE PETITIONERS' STORES OR CUSTOMERS 9

III. CERTIORARI SHOULD NOT ISSUE ON PETITIONERS' THIRD COMPLAINT. THE EVIDENCE AMPLY SUPPORTED A FINDING OF KNOWLEDGE, AND THE ARGUMENT PETITIONERS MAKE RESURRECTS THOSE PREVIOUSLY REJECTED BY THIS COURT 10

TABLE OF CONTENTS – Continued

Page

IV. CERTIORARI SHOULD NOT ISSUE ON PETITIONERS' FOURTH COMPLAINT. IT IS IN PART BASED ON AN INTERPRETATION OF STATE LAW, AND OTHERWISE SEEKS TO DECRIMINALIZE CERTAIN OBSCENITY BY LIMITING THE RELEVANT COMMUNITY STANDARDS TO THOSE OF THE GROUP THAT ESPECIALLY ENJOYS THE PARTICULAR MATERIAL. PUT ANOTHER WAY, IT SEEKS TO EXEMPT PORNOGRAPHY FOR SEXUAL DEVIANT GROUPS FROM THE OBSCENITY LAWS AND THEREBY GIVES THESE GROUPS SPECIAL FAVORABLE TREATMENT UNDER THE CRIMINAL LAW .. 12

V. CERTIORARI SHOULD NOT ISSUE ON PETITIONERS' FIFTH COMPLAINT. IT IS BASED ON A SITUATION WHICH DOES NOT EXIST IN THIS CASE AND ONE THAT IS SO RARE THAT IT IS INCONCEIVABLE THE COURT COULD SPARE ITS TIME FOR IT IN THE ABSENCE OF SOME REAL NECESSITY 14

VI. CERTIORARI SHOULD NOT ISSUE TO REEXAMINE THE *MILLER* TEST..... 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1058, 35 L.Ed.2d 297 (1973) 8

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) 7

Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) 11

Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941) 7

Rosen v. United States, 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606 (1896) 11

Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959) 11

United States v. Dowling, ___ U.S. ___, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) 7

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CINEMA BLUE OF CHARLOTTE, INC., a North Carolina Corporation, aka CINEMA BLUE ADULT ENTERTAINMENT CENTER, aka CINEMA BLUE OF CHARLOTTE, aka CINEMA BLUE, JIM ST. JOHN AND CURTIS RENE PETERSON,

Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

BRIEF IN OPPOSITION

Respondent opposes this petition for the reasons which follow.

SUPPLEMENTAL STATEMENT OF FACTS

Petitioners are prisoners of the State of North Carolina, having been convicted of three felonies at the February 13, 1989 Criminal Session of Superior Court for Mecklenburg County, Honorable Marvin K. Gray, Judge Presiding. St. John was convicted of conspiracy in case 88 CRS 65318, accessory before the fact in case 88 CRS 65320, and accessory before the fact in case 88 CRS 65324. All involved the dissemination of two items of obscene materials, video tapes with short titles of "Video Games X," and "Revue", with each conviction resulting in two year sentences, running consecutively. Peterson was convicted of the same offenses in cases 88 CRS 69853, 88 CRS 62474 and 88 CRS 62478 and also received three consecutive two-year sentences. The corporation, Cinema Blue, was convicted of conspiracy in case 88 CRS 69859, and two counts of dissemination of obscenity in cases 88 CRS 46966 and 88 CRS 46976 and as a result was fined $150,000.00. The petitioners appealed their convictions to the North Carolina Court of Appeals which affirmed in an opinion filed June 5, 1990 and reported at 98 N.C. App. 628, 392 S.E.2d 136. The North Carolina Supreme Court denied further review by order of July 26, 1990, 327 N.C. 142, 394 S.E.2d 181. Petitioners St. John and Peterson currently have an application for writ of habeas corpus pending in the Western District of North Carolina, C-C-90-286-P, raising several issues which appear in this petition, while the corporation has a companion 1983 action pending there under the same case number.

In petitioners' prosecutions, the state's case was based on the items at issue themselves, testimony about the nature and appearance of Cinema Blue's business,

and testimony about the petitioners St. John and Peterson's contacts with the business and store. Certain evidence they offered, loosely characterized as expert, was not admitted and the crux of this petition is whether it was properly excluded consistent with the First Amendment. The items involved and respondents' critique of them from petitioners' pending habeas corpus action is as follows:

> *Film Evaluation Project Questionnaire* (Petition App. D, pp. 17-86)
>
> Tables 4 and 4A of this item (App. 46-54) are an attempt to show community standards with relation to the films at issue by virtue of their impact on 20 to 24 people who were more liberal than the Mecklenburg County Community as a whole. The questionnaire showed that either 61% or 52% thought that adult movies were "tolerated" in the community.
>
> Tables 6 and 6A (App. 57-60) continued this trend. They showed that upon being quizzed before and after being shown five movies, the affirmative opinion on the three questions asked went up after some, down after others and stayed the same after one. At least one of the results made little sense – after seeing one movie, "Control", fewer people said they should be allowed to see it, but fewer people also thought it was unhealthy, shameful or morbid.
>
> The methodology used for inquiries seems flawed in that three questions were asked for most of the questionnaire – do you think adult films are tolerated; do you think you should be able to see them; and do you think that showing adult material appeals to a unhealthy, shameful or morbid sexual interest. The first question references the average adult in the community and registers about a half and half response. The

second deals with the interviewee and registers a three-fourths percent response in favor of latitude. The third references neither of the above, leaving the interviewee to divine whether he is being asked about himself or the community, with response to this question being approximately 50-50 as well. The last two questions also deal with the individuals, not the community; while the first deals with tolerance, not standards.

Tables 7 and 8 (App. 61-70) changed the questions. On Tables 7 and 7A, the first question asked if the interviewee's neighbor checked out the films, would there be "something wrong" with him; the second asked should the neighbor, and the interviewee, be able to check out such films; the third asked if the movies were what the interviewee expected "given this definition of x-rated videos, adult movies and magazines"; the fourth asked would it appeal to the neighbor's unhealthy, shameful and morbid interest in sex; while the fifth asked if a medical professional could use the films in marital therapy. The first and fourth seem fairly remote at best, and may well zero in on the interviewee's opinion of his neighbor, often a friend or enemy, instead of focusing on the act involved; the second runs afoul of the "personal rights" bias; the third is wholly unclear; and both films at issue here flunked the fifth. Tables 8 and 8A only throw in a few additional topics such as gun control, those with religious beliefs dictating what others should read; and the number of similar videos viewed before.

Community Standards Survey (Petition App. 74-86)

This item has 32 questions dealing with spousal and date rape, personal data of the interviewees, a Mecklenburg County religious organization, subscriptions to books and cable

TV, rock music, and the political/religious characteristics of the interviewees. Sandwiched in are five questions about adult movies, the responses to which showed that less than 50% of those interviewed believed they were tolerated, although they also showed a high score on the interviewees' beliefs in their personal right to see these items. Since this was a telephone survey, the interviewees did not see the items at issue in this case.

Telephone Survey of Cinema Blue Customers (Not included in Petition Appendix).

This was a survey of 200 persons done on the eve of trial. It was virtually an all-male survey, the results of which could not be used to generalize to the population as a whole according to petitioner's own witnesses. Instead, they claimed only that it was "one more indicator" of the way things were in Mecklenburg County.

Three Supposedly Comparable Videos (Not developed in Petition Appendix).

These were submitted as comparable items which were claimed not to be obscene, evidently because no prosecution had been based on them. Their relationship to showing contemporary community standards was that they, and others of which they were representative, had been rented from Cinema Blue by about 1.2% of the population in Mecklenburg County (approximately 5,700 rentals from 500,000 people, duplicative renters unknown) in a 7-month period.

From the above, it can be seen that respondents' view of this case as a whole is that petitioner was prevented from putting before the jury technical evidence given to the state late in the game that showed (1) that 40-60% of 20 to 24 citizens willing to watch adult films felt they were tolerated; (2) less than half of the interviewees in a wider

survey thought, speaking hypothetically rather than with regard to the particular items involved in this case, that adult films were tolerated; and, (3) some of the male patrons of Cinema Blue also thought so.

REASONS THE WRIT SHOULD NOT ISSUE

I.

CERTIORARI SHOULD NOT ISSUE TO REVIEW PETITIONER'S FIRST COMPLAINT. THE OPINION EVIDENCE AND SURVEY WERE PERMISSIBLY EXCLUDED UNDER THE DECISIONS OF THIS COURT, DUE PRIMARILY TO THE TENUOUS PROBATIVE VALUE INHERENT IN THE EVIDENCE, AND SECONDARILY TO ITS NEUTRAL-TO-NEGATIVE RESULTS IN THIS PARTICULAR CASE.

Petitioners first argue certiorari should issue to correct the trial court's exclusion of testimony by their experts on contemporary community standards. They assert this was a denial of their right to present a defense, was against the indications of six cases from this court, and was in conflict with other state court decisions.

As noted before, the expert evidence here has been set out in the Petition at pp. 17-113. It consisted of three items – a film evaluation questionnaire, a telephonic community survey, and a telephonic survey of Cinema Blue patrons. The evidence was excluded by Judge Gray as too likely to confuse the jury. As the prior critique of the evidence indicates, this was correct. Therefore it is plain that neither petitioners' claim of error nor of at least certworthiness, is correct.

First, the exclusion of the evidence did not deprive petitioners of their only chance for acquittal as without it they prevailed in two companion cases. In addition, as previously pointed out with regard to the two telephone surveys, the results of the citizenry as a whole were neutral to negative, and were obtained without the person seeing the materials involved in this case. Additionally, the telephone survey of Cinema Blue customers comes close to being a joke in the sense of providing expert evidence, even putting it aside the admitted fact that its results did not generalize to the population as a whole. Finally, even the film evaluation project results were essentially neutral, showing roughly equal views among the participants, with the questions involving the films seeming in many cases to be loaded, remote or irrelevant.

Second, the law on this type of evidence as a matter of constitutional law is fairly clear and this is shown by the six or seven cases from this court that petitioner references. From them, it can be gleaned that this type of evidence is sometimes viewed as being a good bit less than it is offered as, such as in *Kaplan* and *Smith.* Nevertheless, it is admissible under *Miller,* in that the constitution does not preclude its use; and apparently it is often used in California, as 5 of Petitioners' 7 cases from this court having arisen there. Otherwise however, the relevance and admissibility of evidence is usually a matter of state evidentiary law, *Lisenba v. California,* 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941), *United States v. Dowling,* ___ U.S. ___, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990); although on occasion, state evidence rules must yield, such as in the situations presented in *Davis v. Alaska,* 415 U.S. 308,

94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) and *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1058, 35 L.Ed.2d 297 (1973). That this is not such a case, however, is shown by the low probative value of the evidence, along with its questionable quality. Given this, it remained the state's prerogative to exclude it as a matter of law, which it did not, or to exclude it in the trial judge's discretion, which it did. This is a standard evidentiary situation, not a constitutionally significant one, and the evidence involved here does not change this.

The supposed conflict in the case of cases petitioners mention on pages 13 and 14 of his Petition is largely illusory. What often appears is different decisions within a state due to differing fact situations. Examples of this are Massachusetts where *United Box* admits the evidence and *Mascolo* does not; Indiana where *Saliba* admits the evidence and *Sedelbauer* and *Richards* do not; and North Carolina where *Mayes* admits the evidence but *Anderson* and the present case do not. Additionally, putting this point aside, examination of the cases individually does not show a substantial conflict. *Nelson, Assaf* and *Strope* deal with state statutory law, not the federal constitutional principles at issue here; while *Carlock* expressly reserves decision on the primary argument here – the generality of the evidence. *United Box* deals with expertise on literary value, not community standards. *Sedelbauer, Flynt, Mascolo, Mayes,* and *Anderson* exclude this evidence on routine, non-constitutional evidentiary points such as lack of witness qualification or remoteness of the survey questions involved to the issue. *Richards,* which upholds exclusion, and *Barton,* which does not, did not describe the evidence with which they deal. The sum

of this is that where the evidence has been shown to be reasonably relevant to the issue of obscenity as opposed to only checking on general attitudes which are related but removed from the actual issue, the evidence has usually come in. For the reasons previously noted, the evidence here was wide of the mark, as well as being neutral-to-negative.

II.

CERTIORARI SHOULD NOT ISSUE TO REVIEW PETITIONERS' SECOND COMPLAINT. THE COMPARISON EVIDENCE OFFERED TO SHOW CONTEMPORARY COMMUNITY STANDARDS HAD ONLY A 1.2% DEMONSTRABLE ACCEPTANCE AND WAS LIMITED TO THE PETITIONERS' STORES OR CUSTOMERS.

Petitioner next argues that certiorari should be granted to clarify the foundation for admitting of comparative evidence and to discuss the Second Circuit's *Womack* prerequisite of a reasonable degree of community acceptance, urging that the degree of acceptance here would have satisfied the courts in the *Flynt* and *Saliba* cases, thereby creating a conflict to be settled.

The comparison evidence offered here was three videos which were described as representative of petitioner's inventory and, in turn, had been rented 5,700 times by the 500,000 citizens of Mecklenburg County in the preceding 7 months. If it is assumed that each rental was by a different individual, this approximated 1.2% of the population, meaning that petitioner contends that 1.2% of the population is a reasonable degree of community acceptance. It is inconceivable that this could be so

described, considering the evidence is offered as an indication of contemporary community standards. Such standards simply are not set by 1.2% acceptance. Therefore Judge Gray properly kept the jury from the burden of having to divert its attention from the probative evidence to this. The *Flynt* and *Saliba* cases do not seem at odds with this, although petitioner asserts there may be a conflict. In contrast to the single store's customers dealt with in this case, the evidence in *Saliba* (the volume of which was not stated) apparently dealt with magazine distribution to a number of outlets for general interest publications, such as newsstands and bookstores; while *Flynt* definitely did deal with this, the evidence there involving distribution to 324 outlets in Atlanta. Parenthetically, in neither of those cases was the evidence admitted either.

III.

CERTIORARI SHOULD NOT ISSUE ON PETITIONERS' THIRD COMPLAINT. THE EVIDENCE AMPLY SUPPORTED A FINDING OF KNOWLEDGE, AND THE ARGUMENT PETITIONERS MAKE RESURECTS THOSE PREVIOUSLY REJECTED BY THIS COURT.

Petitioners next argue certiorari should issue to correct the trial court's failure to require a finding of *scienter* in the sense of direct evidence of knowledge of both the actual contents of the specific items on which their prosecution was based, and the fact the items were legally obscene. Instead, the state relied on circumstantial evidence, which was substantial in volume, while Judge Gray's instructions required knowledge of the "nature" of the materials. However, petitioner alleges this was in

conflict with the decisions of this court and therefore constitutes a basis for certiorari.

The state's evidence showed the non-corporate petitioners visited Cinema Blue on several occasions and therefore were familiar with the materials in the store. The store was in the business of selling sexually explicit materials; the items at issue in this case were representative of the store's inventory as a whole; the few non-adult items in the store were obviously only for show (e.g., a few out-of-date general circulation magazines; a general audience film which was untitled and never changed); and the investigating officer even got propositioned there.

Applying the law to these facts, the use of the evidence above was in line, not in conflict, with the decisions of this court. It tended to show petitioners were "in some manner aware of the character" of the videos at issue. This was all that was required by *Hamling v. United States*, 418 U.S. 87, 119-124, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); and it provided strong circumstantial evidence of *scienter*. Proof in this fashion is expressly permitted in obscenity cases by *Smith v. California*, 361 U.S. 147, 154, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

This conclusion is unaffected by petitioners' claim that since the material was presumptively protected, this was a bar to inferring *scienter*. The same argument was rejected in *Hamling*, and as early as *Rosen v. United States*, 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606 (1896). *Scienter* relates to factual knowledge about the group of materials involved, not the ins and outs of obscenity law; and this calls to mind the old proverb that ignorance of the law is

no excuse. Petitioners' argument also recalls the warning of Mr. Justice Frankfurter concurring in *Smith* that the knowledge requirement cannot be of such a nature as to nullify, for all practical purposes, the power of the state to prosecute. To accept petitioners' argument would do just that by permitting enforcement of the law only when (1) a person was seen viewing certain materials, and (2) the particular materials were then adjudicated obscene. This would require a permanent in-house stake out.

IV.

CERTIORARI SHOULD NOT ISSUE ON PETITIONERS' FOURTH COMPLAINT. IT IS IN PART BASED ON AN INTERPRETATION OF STATE LAW, AND OTHERWISE SEEKS TO DECRIMINALIZE CERTAIN OBSCENITY BY LIMITING THE RELEVENT COMMUNITY STANDARDS TO THOSE OF THE GROUP THAT ESPECIALLY ENJOYS THE PARTICULAR MATERIAL. PUT ANOTHER WAY, IT SEEKS TO EXEMPT PORNOGRAPHY FOR SEXUAL DEVIANT GROUPS FROM THE OBSCENITY LAWS AND THEREBY GIVES THESE GROUPS SPECIAL FAVORABLE TREATMENT UNDER THE CRIMINAL LAW.

Petitioner next argues that certiorari should issue to limit prosecutions for deviant group materials unless members of the deviant group, rather than average persons, apply their contemporary standards in determining whether the material involved is obscene. Here one of the films – "Video Games X" – was gay porn, and a homosexual from Mecklenburg County testified that the film would not be patently offensive to that group. Judge Gray, however, had the jury decide offensiveness on the basis of general community standards.

Petitioner relies on the *Mishkin* case and on N.C.G.S. § 14-190.1(d) dealing with "children and especially susceptible audiences" to support his argument that the law was not followed and this Court should therefore intervene. The state statute does not seem to be applicable here as homosexuals are not especially susceptible persons in the sense that children are, although certainly they may be a singular target group for certain materials. However, even if respondents are incorrect in this view, the Court does not normally invest its time in the construction of state statutes nor rest its decision on them and there is no good reason to do so here. Turning to *Mishkin*, both it and *Hamling*, in reconfirming *Mishkin* at 127-130, operate the opposite way. They make prurient interest provable when the item involved might be said to have no appeal to non-deviant groups or to the public at large, i.e., to the average person in the community. Where the materials are aimed at deviant groups, prurient interest may be judged either with regard to that group's standards or those of the community as a whole. Put differently, *Mishkin* gives the state somewhat more leeway with its evidence in harder cases. That this is so follows from two facts. First, activities which have a purely sexual appeal and are done in a patently offensive way do not necessarily change just because the members of the performing group change. Second, where sexual preference and activity define the deviancy, then virtually nothing realistic can be conceived of which would meet the "patently offensive" standard if the standards are those of the deviant group. The effect of this would be to permit the public dissemination of pornography while at the same time claiming that the public dissemination was

not public at all – an irrational approach, as well as one which decriminalizes obscenity for some groups but not for others.

V.

CERTIORARI SHOULD NOT ISSUE ON PETITIONERS' FIFTH COMPLAINT. IT IS BASED ON A SITUATION WHICH DOES NOT EXIST IN THIS CASE AND ONE THAT IS SO RARE THAT IT IS INCONCEIVABLE THE COURT COULD SPARE ITS TIME FOR IT IN THE ABSENCE OF SOME REAL NECESSITY.

Petitioner next asserts that certiorari should issue to determine if expert testimony is needed to prove obscenity in the case of deviant group materials, a question reserved in the *Paris Theatre's* decision, footnote 6. This is not the case for determination of this matter, nor is a situation likely to occur that needs it.

The footnote reads in relevant part:

> [The use of experts in these cases often makes a mockery of the concept of expert testimony because "hard core pornography . . . can and does speak for itself"] [cite omitted]. We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest.

Homosexuality, while often described as deviant, is not so bizarre, i.e., unusual, as to fit this description. The sexual activity associated with it is well-known and the deviancy is viewed as arising more from the fact that the acts occur between persons of the same sex, rather than

from the acts themselves. Given this, the Court's footnote seems inapplicable; and more of a limitation on its own prior language in the case, not a marker for a future constitutional decision by it.

VI.

CERTIORARI SHOULD NOT ISSUE TO RE-EXAMINE THE *MILLER* TEST.

Petitioner finally urges certiorari issue to reconsider the entire area of the obscenity law, particularly the *Miller* test. Respondents oppose this.

In considering whether or not to reexamine the *Miller* standard, it must first be kept in mind that the standard is commended by 17 years history of acceptance and interpretation and such familiarity and ease of application as that brings; as well as being commended by the fact that the standards have been used in various state statutes, including North Carolina's. While the *Miller* test may not have worked perfectly or even as easily as desirable, it has worked. Second, the likelihood of getting a semantically or conceptually easier standard is problematical. In fact, petitioners' prior arguments have contemplated a more intricate, and hence more difficult, approach to the problem. Third, the fact that some lower courts grumble is always going to be the case so long as commercial speech is given First Amendment protection, because the in's and out's of First Amendment applications to commerce are not easy. Finally, the differences in application stemming from use of the *Miller* standards inheres in the facts that separate localities within the nation are allowed

to use them and that this is a diverse country where situations differ from locality to locality. The court has already grappled with this and rejected the concept of some national standard. What petitioner seems to argue for, then, is merely a rehashing of that previously decided point.

CONCLUSION

For the reasons above, respondents urge that the Court not issue a writ of certiorari to review the decision of the North Carolina Court of Appeals on petitioners' appeal, and request this Court to deny petitioners' application for same.

This the 18th day of January, 1991.

LACY H. THORNBURG
Attorney General

RICHARD N. LEAGUE*
Special Deputy Attorney General
Post Office Box 629
Raleigh, North Carolina
27602-0629
(919) 733-3109
Attorneys for Respondent

*Member of the Supreme
Court Bar; Counsel of Record

(3)

No. 90-675

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In The

Supreme Court of the United States

October Term, 1990

CINEMA BLUE OF CHARLOTTE, INC., a North Carolina Corporation, a/k/a CINEMA BLUE ADULT ENTERTAINMENT CENTER, a/k/a CINEMA BLUE OF CHARLOTTE, a/k/a CINEMA BLUE, JIM ST. JOHN AND CURTIS RENE PETERSON,

Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

Petition For Writ Of Certiorari To The North Carolina Court Of Appeals

REPLY BRIEF

KLEIN & SHAFER, P.C.
BRADLEY J. SHAFER*
LEE J. KLEIN
4121 Okemos Road, Suite 20
Okemos, MI 48864
517-349-8666
Attorneys for Petitioners
*Counsel of Record

NELSON M. CASSTEVENS, JR.
P.O. Box 34607
Charlotte, NC 28234

CALVIN MURPHY
Suite 210, 1 N. McDowell
101 N. McDowell Street
Charlotte, NC 28204

EBEN RAWLS
730 Trade Street
523 Law Building
Charlotte, NC 28202

Co-Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES ii

I. EVIDENCE OF CONTEMPORARY COMMUNITY STANDARDS..... 1

II. LACK OF EVIDENCE OF SCIENTER..... 5

III. FAILURE TO CHARGE STATUTORY DEVIANT INSTRUCTION..... 7

IV. AFFIRMATIVE EVIDENCE AS TO THE OBSCENITY OF DEVIANT MATERIALS..... 9

V. RE-EXAMINATION OF *MILLER*..... 9

INDEX OF AUTHORITIES

Page

CASES

Hamling v. United States, 418 U.S. 87 (1974).....8, 9

Lakin v. United States, 363 A.2d 990 (D.C. 1976)..... 8

Manual Enterprises v. Day, 370 U.S. 478 (1962)..... 8

Miller v. California, 413 U.S. 15 (1973).....8, 9, 10

Newman v. Conover, 313 F.Supp. 623 (N.D. Tex. 1970)..... 8

People v. G.I. Distributors, Inc., 228 N.E.2d 787 (N.Y. 1967)..... 8

People v. Spargo, 431 N.E.2d 27 (Ill. App. 2d Dist. 1982)..... 8

Pinkus v. United States, 436 U.S. 293 (1978)..... 8

Roth v. United States, 354 U.S. 476 (1957)..... 8

State v. Terry Treadwell, No. 88-CRS-46915 5

United States v. Hiscott, 586 F.2d 1271 (8th Cir. 1978)..... 9

United States v. Hutchinson, 338 F.2d 991 (4th Cir. 1964)..... 9

United States v. Levy, 153 F.2d 995 (3rd Cir. 1946)..... 9

United States v. Manarite, 448 F.2d 583 (2d Cir. 1971), cert. denied, 404 U.S. 947 (1971)..... 8

United States v. Potomac News Company, 373 F.2d 635 (4th Cir. 1967), rev'd on other grounds 389 U.S. 47 (1967)..... 8

Ward v. Illinois, 431 U.S. 767 (1977) 8

INDEX OF AUTHORITIES – Continued

Page

STATUTES

N.C.G.S. § 14-190.1(d) 7

OTHER AUTHORITIES

Linz, *Estimating Community Standards; The Use of Social Science Evidence in an Obscenity Prosecution*, Spring 1991, Public Opinion Quarterly 80 (proofs filed in the library of the Supreme Court) 3, 4, 9, 10

No. 90-675

In The

Supreme Court of the United States

October Term, 1990

CINEMA BLUE OF CHARLOTTE, INC., a North Carolina Corporation, a/k/a CINEMA BLUE ADULT ENTERTAINMENT CENTER, a/k/a CINEMA BLUE OF CHARLOTTE, a/k/a CINEMA BLUE, JIM ST. JOHN AND CURTIS RENE PETERSON,

Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

Petition For Writ Of Certiorari To The North Carolina Court Of Appeals

REPLY BRIEF

I.

EVIDENCE OF CONTEMPORARY COMMUNITY STANDARDS

Respondent attempts to attack the proffered defense evidence both from a factual and a legal basis, setting forth its factual dispute at pages 3-5 of its brief. These "concerns" are properly addressed to only the weight of such evidence, and ignore, in total, the 243 pages of testimony rendered by the proffered witnesses. However, response to some of the points raised well illustrate the lack of any basis to the purported arguments.

The state initially asserts that the results of the film study are predicated only upon the impact of "20-24 people who are more liberal in the Mecklenberg County community as a whole." First, the experts testified that the results obtain from the various film viewing groups could be combined so that the answers of all 129 participants of the film study could be considered together to provide evidence of the contemporary community standards. Second, the testimony further established that one of the purposes of conducting the film study was to *validate* a description of sexually explicit material that had been used in a telephone survey of 407 randomly selected adults from the community, and that the results of the film study did, in fact, validate that description. See App. 38-39. Third, the state is, of course, somewhat disingenuous in this argument since many scheduled participants of the film study had to be canceled due to the threat of prosecution of the expert witnesses. App. 20. Fourth, Dr. Land testified that he had performed mathematical calculations and had determined that the sample size of the film study was sufficient. Fifth, not only did Dr. Land testify that, after having evaluated the data obtained, there would be no effect on the validity of the study due to any "liberal" bias, but, more importantly, participants in the film study were actually *more conservative* in some respects than the community as a whole. For example, table 5, question 3 (the "prurient appeal" question) (App. 55) which shows that 20% of the community (as measured by the 1987 telephone survey) would find such materials appealing to a prurient interest, while *45%* of the participants in the film study (before seeing a film) would find such prurient appeal.

Respondent then asserts that the studies illustrate that "either 61% or 52% thought that adult movies were 'tolerated' in the community." What the state fails to tell this court is that the tables that it refers to were questionnaires administered *before* the participants saw the films and magazine. *After* viewing the materials, table 5 (App. 55) indicates that *only 19% of the participants believed that the films would appeal to a prurient interest.* See also App. 42.

Regarding the patent offensiveness ("tolerance") questions, the responses remain essentially the same, before and

after viewing the films. However, there is a marked question as to whether the proper "patent offensiveness" inquiry is that reflected in table 5, question 1 (App. 54) (asking whether the participant thought that such materials were tolerated in their community), or as evidenced by table 5, question 2 (App. 55) (asking whether they believed that they individually should be able to see such materials). If the latter question is correct, the patent offensiveness issue is then also resolved by an overwhelming margin of 75%.

While the issue as to the propriety of the patent offensiveness question is somewhat discussed in the film report (App. 34-35), this issue is further discussed in an article regarding this study set to appear in the Spring issue of Public Opinion Quarterly entitled: Linz, *Estimating Community Standards; The Use of Social Science Evidence in an Obscenity Prosecution*, Spring 1991, Public Opinion Quarterly 80. (Acceptance of this study for publication by such a peer-reviewed journal should also serve to illustrate the validity of the methodologies employed). Although scheduled to be published in March, undersigned counsel has obtained "printers proofs" (for proofreading prior to printing) of this article which have been filed with the library of this Court for this Court's review in the determination of these issues.[1] Linz analyzes the two potential types of "tolerance" and concludes, petitioners would contend correctly, that the proper standard is the collective opinions of the individuals about what they personally should be allowed to view. See *Linz, supra,* at 105-108.[2]

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[1] While two of the undersigned counsel are listed as co-authors of this article, counsel's participation consisted of the analysis of the obscenity law found at pages 81-85 of that article, with counsel taking no part in the analysis made, conclusions reached, or suggestions proffered in the remainder of that article.

[2] The state also argues (B.p. 4) that the "prurient appeal" question is flawed "leaving the interviewee to divine whether he is being asked about himself or the community, with response to this question being approximately 50/50 as well." The state has, however, apparently ignored the

(Continued on following page)

Nit picking through the film study report, however, ignores the proffered testimony at trial. The experts did not testify in minute detail to every single question contained in the report, nor to every minutiae of data obtained. The experts simply discussed the procedures, the critical questions involved in the obscenity test, the results obtained with regard to those questions, and their ultimate opinion as to the lack of prurient appeal and patent offensiveness of the particular materials at issue. Reviewing the introduction of the film study and the *Linz* article establishes that the studies conducted were absolutely methodologically sound, that post investigation analysis has established that the studies do not suffer from any form of bias, and that the evidence and testimony clearly could have assisted the trier of fact in determination of the issues presented to it, and would have been of benefit to the defense.

The state then raises various legal arguments to support the exclusion. First, Respondent argues (B.p. 7) that the proffered defense was not necessary to establish innocence, since two of the four charged materials were found to be not obscene without any defense being admitted whatsoever. However, what the state fails to recognize is that what this disparity of results illustrates is that the exclusion of the defense cannot be considered to be harmless error, since the evidence of the guilt of the defendants (or, more particularly, the obscenity of the charged materials) cannot be considered

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(Continued from previous page)

methodological introduction to the film study as set forth in App. 17-42 which illustrates that question 11 of table 8 (App. 67) is the key "prurient appeal" question *after having viewed the film, which specifically requests the viewers personal opinion, rather than the "community's" as has been implied by the state.* See also *Linz, supra,* at 97-98, 108. In addition the assertion of a "50/50 split" ignores the *post*viewing data as referenced.

The state then goes on to question the propriety of certain additional questions, some of which are in the various questionnaires as "introductory materials", and some of which are relevant to the studies. The propriety of those questions are set forth in the procedures section of the film study report found at App. 18-42.

to be overwhelming, as materials markedly similar to the materials that were found to be obscene were, on the other hand, found to be constitutionally protected by the jury. It should be of particular note as to the relevancy of the studies that of the six materials evaluated, two were found to be non-obscene (not just "not guilty" verdicts) in this prosecution (the film "Switch" and the magazine "Sexy"), a third was found to be non-obscene in the subsequent prosecution of *State v. Terry Treadwell*, No. 88-CRS-46915 (the film "Penetration"), and charges against two others were dismissed by the prosecution. This, therefore, supports the validity of the conclusions reached in the study. Had the defendants been allowed to submit their proffered defense, it is reasonably likely that there may not have been any convictions at all.

II.

LACK OF EVIDENCE OF SCIENTER

Respondent posits that the circumstantial scienter evidence against the individual Defendants was "substantial in volume," and that the Defendants had visited the Cinema Blue premises "on several occasions and therefor were familiar with the materials in the store." A simple review of the "substantial" evidence presented at trial against Petitioner Peterson is instructive in this regard. Grady Burr testified as follows:

> "He worked for Cinema Blue from July 4, 1985 until August of 1988, and first met Peterson in May or June of 1988 "when our computers were installed." Peterson's responsibility was to "put the computer in, install it, show us how to run the computer, and show us how to enter things in . . . ". T.pp. 295, 299-300.

Ernest Smith then so testified:

> He had worked at Cinema Blue from January 1982 until August of 1988 as a projectionist and then a general manager, and that the first time he met Peterson was sometime in 1982 when Peterson went upstairs to show him "how to re-time the projection equipment." The next time that he saw Peterson was

> early in April or May of 1988 when Peterson was in Charlotte to instruct them on the use of the computer. He believed that Peterson was in Charlotte installing the computer for approximately 2 weeks. The only contact he had with Peterson in 1988 was with regard to the installation of the computers. T.pp. 310-313, 346, 405-406.

Finally testifying was David Schoch:

> He worked for Cinema Blue from 1980 until August of 1988, and was employed as the manager and President. When he went to work for Cinema Blue, Mr. Peterson was his "boss", but that "St. John took over in October '86." He gave conflicting testimony as to the number of times that Peterson had been in the Cinema Blue store from October 1, 1985 to June of 1988, at one point indicating that Peterson had made one trip, and at another time indicating "about six times." He was specific, however, that "in '86, Jim St. John became [his] boss." "I'd go to Curt and ask him different things, and Curt would say that he was no longer my boss, that I would have to take my problems to Jim St. John." Peterson's sole contact at Cinema Blue in 1988 was for approximately one week to install the computer. Of the two films that were adjudicated to be obscene, "Review," had a warehouse inventory tag dated "May 20, 1988," although he did not know when the film arrived at the store. The film, "Video Games," had a tag dated "12-18-87" that meant that it came into the store sometime after that date. T.pp. 420, 424-425, 440, 452, 489, 545, 554.

This evidence is enlightening in two critical particulars. First, the totality of the evidence establishes that Peterson's *sole physical contact* at Cinema Blue in 1988 (when the two materials may have *arguably* been on premises) was to install a computer. However, there was no testimony or evidence that the materials were, in fact, at Cinema Blue at that time (the testimony may actually indicate to the contrary), or that Peterson was aware of or saw those materials, or that he had any specific knowledge whatsoever of the contents of those particular materials (or any of the other materials at the

Cinema Blue store) during the period of time that he was there to install the computer, other than being aware that the store carried "adult" materials.

Second, the unrefuted testimony established that Peterson ceased being Schoch's "boss" in early 1986, long before the two materials in question arrived at Cinema Blue. While this Court has never addressed the constitutionally requisite scienter sufficient to support obscenity *related* convictions (i.e., conspiracy, accessory before the fact, etc.), logic would dictate that the First Amendment would not allow conviction without knowledge of the contents of the particular materials charged to be obscene, or at least some type of such implied knowledge (i.e., being a "boss"), neither of which exists here. Clearly, this Court has never accepted the argument, advanced by the state here, that it is sufficient that someone merely have knowledge of the character (i.e., "adult") of materials *other* than those charged as obscene, without having any specific knowledge of the contents of *any* particular material.

III.

FAILURE TO CHARGE STATUTORY DEVIANT INSTRUCTION

The State argues that N.C.G.S. § 14-190.1(d) dealing with "especially susceptible audiences" is not a "deviant instruction" applicable to homosexuals in the context of this Court's decision in *Mishkin*.[3] In analyzing this argument, two questions must be reviewed. First, is this a statutory codification of *Mishkin*? Although the state argues otherwise, the answer is clearly "yes." This Court has consistently noted that the purpose of the obscenity test is to judge the *impact* and

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[3] The state also seems to argue that Petitioners' argument in this respect somehow "seeks to decriminalize" certain materials from the standard of obscenity. This is a ridiculous assertion as all Petitioners have requested is that the jury be properly instructed pursuant to this Court's pronouncement in *Mishkin* and the statutory language as found in the North Carolina obscenity statute. This is not a request for "construction of state statutes" as alleged by the Respondents (B.p. 13), but is, rather, a request that due process be applied.

affect of material upon the average person, or, at least, those whom it is most likely to reach. *Roth v. United States*, 354 U.S. 476, 489-490 (1957); *Manual Enterprises v. Day*, 370 U.S. 478, 487-488 (1962); *Miller v. California*, 413 U.S. 15, 20 (1973). In *Mishkin*, however, this Court quite appropriately noted that certain materials designed for and disseminated to sexual deviants would not have the effect of appealing to the prurient interest of the average person. That is the reason that this Court modified the obscenity test so that material could be judged by its "intended and probable recipient group." The North Carolina provision at issue does just that.

In addition, the North Carolina statutory language at issue is similar to the language found in other states' obscenity statutes. The "especially susceptible audiences" language as found within those statutes has been noted to be mere codification of this Court's pronouncement in *Mishkin*. See, for example, *People v. Spargo*, 431 N.E.2d 27, 32-33 (Ill. App. 2d Dist. 1982), and *Newman v. Conover*, 313 F.Supp. 623, 629-630 (N.D. Tex. 1970). See also, *Hamling v. United States*, 418 U.S. 87, 107 (1974); and *Ward v. Illinois*, 431 U.S. 767, 770 fn. 1 (1977).

The second question is whether homosexuals are a "deviant" sexual group, or, more particularly, are an "especially susceptible audience" falling within the statute. The case law is clear that homosexuals are a deviant group when considering the *Mishkin* obscenity standard.[4] In fact, *Mishkin* itself dealt with lesbian depictions. At the very least, the issue of whether the film "Video Games" is targeted to an "especially susceptible audience" was a question of fact that was stolen from the jury by the trial court's conclusion not to charge the

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[4] See, for example, *Pinkus v. United States*, 436 U.S. 293, 301-303 (1978) in conjunction with the underlying appellate decision found at 551 F.2d 1155, 1158 fn. 7, 1161 (9th Cir. 1977); *Lakin v. United States*, 363 A.2d 990, 997 fn. 9 (D.C. 1976); *United States v. Manarite*, 448 F.2d 583, 592 (2d Cir. 1971), cert. denied, 404 U.S. 947 (1971); *People v. G.I. Distributors, Inc.*, 228 N.E.2d 787 (N.Y. 1967); *United States v. Potomac News Company*, 373 F.2d 635, 640-641 (4th Cir. 1967); rev'd on other grounds, 389 U.S. 47 (1967).

complete statute. It is fundamental error and a denial of due process to fail to instruct the trier of fact with all essential elements of the crime.[5]

IV.

AFFIRMATIVE EVIDENCE AS TO THE OBSCENITY OF DEVIANT MATERIALS

The state argues that homosexuality is not so bizarre as to fit within footnote 6 of *Paris Adult*. B.p. 14. This statement is in error. See, for example, the cases cited at fn. 4, *supra*. As the evidence proffered by the Defendants in this case calls into question the assumption that jurors intuitively know the contemporary standards of the adult heterosexual community (see *Linz, supra*, at 104-109), it is therefore ridiculous to attempt to argue that the average heterosexual juror would intuitively know, beyond a reasonable doubt, the impact that certain deviant material would have upon the gay community. Although jurors may rely upon their own knowledge of the views of the "average person" in the community from which they come, *Hamling, supra*, at 104-105, it would be a baseless legal fiction to conclude that an individual juror possesses sufficient information of *homosexuals*, as opposed to the "average person", to permit prosecution without any evidence whatsoever of the impact of such deviant material on its intended and probable recipient group.

V.

RE-EXAMINATION OF *MILLER*

If there was ever a time an a case warranting the re-examination of the tri-partite obscenity test in the seventeen years since the announcement of the *Miller* decision, it is now, and it is this prosecution. The past year has witnessed the questionable extension of obscenity prosecutions, some

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[5] See, for example, *United States v. Hiscott*, 586 F.2d 1271, 1275 (8th Cir. 1978); *United States v. Hutchinson*, 338 F.2d 991 (4th Cir. 1964); and *United States v. Levy*, 153 F.2d 995, 998 (3rd Cir. 1946).

successful and some not, to areas that have historically been free of such concerns, exemplified by the "Mapplethorpe" prosecution against a contemporary art museum in Cincinnati, Ohio, and the numerous "2 Live Crew" prosecutions in Florida predicated against a "rap" record album and live performances of the songs contained therein.

In addition, this is the first case that this Court has reviewed since *Miller* which contains hard evidence that the underlying assumptions in *Miller* are not, or may not be valid, regardless of the platitudes argued by Respondent. The *Linz* article analyzing the studies conducted here notes and establishes, for example, that individuals perceive community standards as markedly different than actually exists (predicated upon the sum of individual personal opinions); that highly publicized prosecutions can result in misinformation regarding the community standards that may allow prosecutors, by the simple act of filing charges, to affect perceptions of those standards; that various sociological factors may impact upon the ability of individuals, particularly in the public circumstances that jurors may find themselves, to honestly project their opinions on this topic; and, most importantly, that individuals do not *inherently* know what the contemporary standards are in their community regarding sexually explicit materials. See *Linz, supra,* at 102-109. These factors, casting grave doubt on the core assumptions of *Miller,* warrant re-examination of this body of law by this Court.

NELSON CASSTEVENS
602 E. Morehead Street
Charlotte, NC 28202

CALVIN MURPHY
1 North McDowell Street
Suite 210
Charlotte, NC 28204

EBEN RAWLS
730 E. Trade Street
523 Law Building
Charlotte, NC 28202

Co-Counsel for Petitioners

Respectfully submitted,

KLEIN & SHAFER, P.C.
BRADLEY J. SHAFER*
LEE J. KLEIN
Attorneys for Petitioners
4121 Okemos Road
Suite 20
Okemos, MI 48864
(517) 349-8666

*Counsel of Record